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**“THE DUCHY OF CORNWALL – A FEUDAL REMNANT?”**

**“An examination of the origin, evolution and present status of the  
Duchy of Cornwall”**

by

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### **ABSTRACT**

This thesis conducts a legal analysis of the Duchy of Cornwall and how its perceived status has changed over the centuries. The roots of the Duchy date back nearly a thousand years therefore an understanding of the roots of the Duchy and its evolution, focussing on the significant legal issues, over time is necessary to comprehend its present position. The thesis concludes by exploring issues surrounding the contemporary legal status of the Duchy and identifies areas in which there is a convenient ambiguity. In doing so it establishes that while the Duchy and Government describe it as a “private estate” it enjoys privileges and rights which are unique to a “private estate”. In addition it has a significant role in supporting the United Kingdom’s Head of State, the Sovereign, and the heir to the throne. The associated research undertaken in connection with this thesis presents new information which challenges the arguments of those who claim via the Duchy a special constitutional status for Cornwall. The evidence also suggests that the Duchy is not, despite claims to the contrary, publicly accountable in way that is expected in the 21<sup>st</sup> Century.

The possibilities suggested by the Freedom of Information Act 2000 have been utilised and the experience gained will be of value to future researchers. As a consequence of the refusal of public authorities to provide information five complaints have been made to the Information Commissioner and there have been, at the time of writing, four cases in front of the First Tier Tribunal (Information Rights).

The material contained within the National Archives has been comprehensively investigated for the first time by anyone with any interest in the Duchy. This has revealed significant new information which although publicly available was not generally known and casts new light on the status of the Duchy. An exploration of the Parliamentary Archives, not previously undertaken, raises questions about the basis of the privileges enjoyed by the Duchy. A similarly detailed review of the legal material, including important court cases challenges the “rights” claimed for the Duchy.



## **LIST OF CONTENTS**

Acknowledgements	Page	x
Summary		xiii
Introduction		2
A Methodology		7
B Literature Review		14
C Conclusion		21

### **PART 1**

#### **The Origin and Evolution of the Duchy**

Chapter 1 -	Background to the Creation of the Duchy of Cornwall	
	1066 – 1337	24
A	Introduction	24
B	Cornwall and the Anglo-Saxons	24
C	Cornwall after the Conquest	27
D	The Creation of the Duchy	36
E	Conclusion	40
Chapter 2 -	The Creation of the Duchy of Cornwall	42
A	Introduction	42
B	Charter of Creation 17 <sup>th</sup> March 1337	42
C	Charter 18 <sup>th</sup> March 1337	45
D	Charter 3 <sup>rd</sup> January 1338	46
E	Charter 9 <sup>th</sup> July 1343	46
F	The Charters – A “re-collection of dismembered rights”	47
G	The Duke to be “maintained in a manner becoming the nobility of his race”	48
H	“..the Duke was quasi-sovereign within his Duchy”	50

I	“the Duke is Seigniorial Lord of the Entire County”	52
J	Conclusion	54
K	“The strange species of inheritance”	55
L	“..to the same forever remain..”	60
M	Conclusion	60
Chapter 3 -	The Duchy of Cornwall 1337 – 1837	62
A	Introduction	62
B	1337 – 1376 - The Government of the Black Prince	62
C	1376 – 1485 – York and Lancaster	66
D	The Prince’s Council	67
E	1485- 1603 – The Tudors	68
F	1603 – 1714 – The Stuarts	75
G	1714 – 1837 – The Hanoverians	79
H	The Stannaries	85
I	Conclusions	85
Chapter 4	The Duchy of Cornwall – From Queen Victoria to Prince Charles	
A	Introduction	87
B	The Accession of Queen Victoria	88
C	The Twentieth Century	113
D	Prince Charles – Duke of Cornwall 1952 – date	118
E	Conclusion	121
Chapter 5 -	The Stannaries	124
A	Introduction	124
B	Miners and Mining Law	125
C	The Origins of Stannary Law	127
D	The independence of the Stannary System	130
E	Territorial Jurisdiction of the Stannaries	130
F	Who were tanners within the jurisdiction of the Stannaries?	131

G	Stannary Law – Extent of Jurisdiction	133
H	Bounding	135
I	Coinage	136
J	The Convocation of the Stannaries of the Duchy of Cornwall	137
K	Conclusion	141
L	Does Stannary Law have any modern application?	141
M	The Revised Cornish Stannary Parliament	147
N	Conclusion	148

## **PART 2**

### **The Present Status of the Duchy of Cornwall**

Chapter 6 -	The Management and Legal Status of the Duchy of Cornwall	
A	Introduction	151
B	The Prince's Council	151
C	The Officers of the Duchy of Cornwall	151
D	Treasury Control	154
E	Management during vacancy	156
F	Management during minority of the Duke of Cornwall	156
G	The Duchy a legal entity?	156
H	Conclusion	159
Chapter 7 -	The Duchy of Cornwall – A Private Estate	
A	Introduction	161
B	Private Estate – Background	162
C	The Duchy of Cornwall and the Civil List	165
D	The Duchy of Cornwall – A Private Estate – Initial Considerations	167
E	The Duchy of Cornwall and its Public Administrative Functions	172

F	Crown Private Estate Acts	176
G	Conclusion	179
Chapter 8 -	A Extraordinary Private Estate	182
A	Introduction	182
B	“The Duchy is not Cornwall and Cornwall is not the Duchy”	182
C	Right to the Isles of Scilly	189
D	Right to foreshore of Cornwall, fundus and mines and minerals under the foreshore and fundus of the riverbed	192
E	Right to search for and work mines in accessionable manors	192
F	Right to Mines Royal?	193
G	Right to Escheat	195
H	Right to <i>bona vacantia</i>	198
I	Right to Royal Fish	199
J	Right to wrecks	200
K	Right to Treasure Trove	201
L	Right to “Prick” or appoint High Sheriff of Cornwall	201
M	Right to summon the Convocation of the Tinnors of Cornwall	201
N	Right to “present clerical livings”	202
O	Rights applicable to the solicitor to the Duchy of Cornwall and the Attorney General to H.R.H. the Prince of Wales; Duke of Cornwall	202
P	The right of the Prince of Wales, Duke of Cornwall to be represented by his own Attorney General	203
Q	Right not to pay tax	203
R	Right to Crown Immunity	203
S	Right of the Prince of Wales as Duke of	

	Cornwall to give consent to Parliamentary Bills in relation to interests of the Duchy of Cornwall	203
T	Right of the Duchy not to be extinguished for want of a Duke	203
U	Conclusion	203
Chapter 9 -	The Duchy, Parliamentary Usage, Crown Immunity and Taxation	206
A	Introduction	206
B	The Constitutional Position of the Prince of Wales	206
C	The Prince of Wales' Consent	208
D	The right to be consulted	213
E	The Criteria for Consultation	217
F	Conclusion	218
G	The Duchy and Crown Immunity	220
H	Conclusion	226
I	The Duchy of Cornwall and Taxation	230
J	Conclusion	234
Chapter 10-	Conclusions	236
A	Introduction	236
B	Cornish Distinctiveness	236
C	Conclusions	244
D	Other Issues Arising	244
E	Conclusions	249
F	Recent Controversies	249
Appendix A	The Earls and Lords of Cornwall from 1066 to the Creation of the Duchy	253
Appendix B	The Dukes of Cornwall	256
Appendix C	Charters of the Earldom and Duchy of Cornwall	260
Appendix D	The Cornish Stannary Charters and Resolutions of the Privy Council	298

Appendix E	Cornwall and Palatine Counties	314
A	Introduction	314
B	The Origin of Palatine Counties	316
C	The Characteristics and Definitions of Counties Palatine	319
D	Summary	323
E	The Earldom and Palatine County of Chester	324
F	The Duchy and County Palatine of Lancaster	327
G	The Duchy of Cornwall and the Palatine County of Chester and the Duchy and Palatine County of Lancaster	330
H	Conclusion	331
Appendix F	Articles of Agreement Between Crown and Duchy of Cornwall 1620	334
Appendix G	Law Officers Opinion regarding Mines Royal 1860	339
Appendix H	Board of Inland Revenue Instructions and Law Officers Opinion 1913	341
Appendix I	Copy Papers From TNA T 160/632 - “Royal Family Civil List in relation to the hereditary and temporary revenues of the Crown”	362
Appendix J	Information Commissioners Decision Notices – FER03800352 – Dept. of Environment, Food and Rural Affairs; FS50381429 – Dept. of Transport; FS50387051 – Dept. for Business, Innovation and Skills; FS50423025 – Cabinet Office and FS50444734 – HM Revenue & Customs	365
Appendix K	Copy correspondence between Department of Communities and Local Government – Local Democracy, Economic Development and Construction Bill  Copy correspondence between Department of Transport and Duchy of Cornwall – Marine Navigation Aids Bill  Copy correspondence between Department Environment, Food and Rural Affairs and Prince of Wales – Marine Bill  Copy correspondence between Department of Business Innovation and Skills and Royal Household – Apprenticeships Bill	382



		400
Appendix L	Office of Parliamentary Counsel	
	“Queen’s or Prince’s Consent”	
	“Crown Application”	
		436
Appendix M	First Tier Tribunal	
	John Kirkhope v Information Commissioner and National Archives (EA/2011/0185)	
		497
Bibliography		529
List of Statutes, Cases and Information Commissioner’s Decisions		548

## ACKNOWLEDGEMENTS

The Duchy of Cornwall attracted me initially because its study allowed me to combine two of my passions that of history and the law. It would be interesting, I thought, to try and shed some light on what I considered, at first, to be merely a dusty backwater of our national life. Its longevity was intriguing but then, as my researches continued, I discovered the Duchy of Cornwall is not just a quaint holdover from the past but a wealthy, influential and little understood organisation which continues to play a significant role in the support of the British state. My researches, I hope, will lead to a greater understanding of the Duchy and encourage it to be more publicly accountable.

I have, of course, been assisted by a number of people and organisations. I would like to thank Mr Pitt- Lewis of H.M. Land Registry, the staff at the Parliamentary Archives and at Weston-super-Mare Library whose diligence and indeed interest in the project has been gratifying and encouraging. Colin Murley of Redruth, Cornwall has provided me with a great deal of material at some cost and inconvenience to himself. He also asked challenging questions and generally has been very supportive. Mr Jonathan Crow, Q.C., Attorney General to H.R.H. the Prince of Wales has always taken the time to answer the questions I have put to him for which I am grateful. Joseph Barrett, Barrister of 11 Kings Bench Walk, has represented me in Court *pro bono* and, in addition, suggested additional areas for investigation. Andrew George, M.P. has been very helpful including asking questions in Parliament drafted by me. Lord Berkeley has also been supportive. My supervisors at the University of Plymouth, Ms Ann Lyon and Dr Andrew Clark, have provided guidance and support for which I am indebted. Mostly I wish to thank my long suffering and patient wife Lisa for the help and criticism she has provided to me. She has invested in this project and shown a patience which far exceeds that which I am entitled to expect.



### **AUTHORS DECLARATION**

At no time during the registration for the degree of Doctor of Philosophy has the author been registered for any other University award without the prior agreement of the Graduate Committee

Work submitted for this research degree at Plymouth University has not formed part of any other degree either at Plymouth University or at another establishment

Word count of main body of thesis 78,828

Signed *John Kirkhope.*

Date 3<sup>rd</sup> June 2013

# **“The Duchy of Cornwall – A Feudal Remnant?”**

## **Summary**

### **“A Mysterious, Arcane and Unique Corner of our Constitution”**

The objective of this thesis is to analyse the legal and constitutional position of the Duchy of Cornwall. The Duchy has been called “a mystery”<sup>1</sup>, “anomalous”<sup>2</sup> “unique”<sup>3</sup> and the laws relating to it “arcane”<sup>4</sup>. Few historians, and even fewer lawyers, have sought to shed light on this extraordinary institution. This study addresses this neglected area of research, examines the Duchy’s legal history and sets out its contemporary legal and constitutional position, highlighting those areas in which there are ambiguities. In doing so it will challenge claims made by the Duchy, Government and other researchers and writers about its status and will question the legal basis for some of the privileges it enjoys.

There have been few studies written by lawyers. As far as can be established the last was by Sir George Harrison<sup>5</sup> in 1838, a distinguished attorney well acquainted with the Duchies of Lancaster and Cornwall, in which he sets out reasons why the Royal Duchies should not be surrendered with the other Hereditary Revenues of the Crown. There have been other books written by those with an interest in Cornwall’s relationship with the English Crown and English state<sup>6</sup>. The creation of the Duchy, its development over time and its claimed true relationship with Cornwall, and the fact that connection has been deliberately obscured is the focus of much of their attention. This thesis is the only work written by a lawyer, in modern times, which attempts to provide an objective legal “treatise” on the Duchy of Cornwall as it has evolved over time.

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<sup>1</sup> *The Princes Case* (1606) (8 Rep 1.)

<sup>2</sup> Concanen, G., *A Report of the Trial at Bar Rowe v Brenton* (1830) p 63

<sup>3</sup> Haslam G., *An Administrative Study of the Duchy of Cornwall 1500 to 1650* (1975) Thesis (PhD): Louisiana State University.

<sup>4</sup> Law Commission and HM Land Registry Land Registration for the 21<sup>st</sup> Century: A Conveyancing Revolution, Law Com 271 (2001) p 234

<sup>5</sup> Harrison, Sir George, *Memoir Respecting the Hereditary Revenues of the Crown and the Revenues of the Duchies of Lancaster and Cornwall* (1838)

<sup>6</sup> For example the works of John Angarrack in particular *Our Future is History* (2002)

This is the first investigation into the Duchy which has systematically researched the files contained within the National Archives, summarises the relevant information, the majority of which having not been previously published, and explores the contradictions and difficulties which are highlighted by those papers. The National Archive evidence shows there has been, and continues to be, a policy of avoiding litigation with issues often resolved by reference to Government Law Officer's Opinions which are untested by the Courts despite the fact that those views have been inconsistent one with another. The question of whether, in law, the Duchy is entitled to claim some of the privileges which it now enjoys is considered.

Material from the National Archives shows the Duchy is persistent in its claims accepting those decisions of the Law Officers and arbitrators in its favour and challenging over long periods those which are not. It is also demonstrable that when the Duchy has succeeded in its claims it has managed to "retrieve" from the Crown Estate that which the Sovereign has otherwise surrendered to the State as part of the Crown's Hereditary Revenues. It will become evident that the full extent of the Duchy's privileges, particularly its rights against the Crown, is by no means agreed.

There has, until now, been no comprehensive examination of case and statute law as it has been applied to the Duchy or a consideration of what the judiciary has decided from time to time.

The context within which the Duchy of Cornwall was created, its evolution and its relationship with Cornwall is important for a full understanding of its present position. There are three areas of particular significance.

1. During the nineteenth century an important source of the income and power of the Duchy arose from its control of the Stannaries, their system of courts, administration and the Convocations of the Tinnars of Cornwall and of Devon. The Duchy still appoints an individual to the position of Lord Warden of the Stannaries. There are a number of excellent works on the Stannaries<sup>7</sup> but they consider the Stannaries in isolation rather than as part of the overall analysis of the legal and constitutional position of the Duchy.

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<sup>7</sup> See for example the writings of the late Professor Robert Pennington's *Stannary Law* (1973) and G R Lewis *The Stannaries: A Study of the Medieval Tin Miners of Cornwall and Devon* (1908 Republished 1965)

This study does not duplicate the material available but will highlight the legally significant aspects of the Stannaries and consider if they have any modern legal relevance.

2 There is no work which considers the Duchy of Cornwall and its relationship with the other Hereditary Revenues of the Crown: their surrender, the development of the Civil List and the contribution made by the Duchy of Cornwall to financing one of the important functions of the State, that of supporting the Sovereign, and the heir to the throne, in his or hers official capacity. This work fills that gap.

3 The Duchy of Cornwall shares characteristics with Palatine Counties, such as Chester, Durham and in particular the other Royal Duchy, the Duchy of Lancaster. Included at Appendix E there is a comparison with them and, therefore, provides greater context better understanding of the status of the Duchy of Cornwall.

The Duchy of Cornwall has a “historical context which is complicated possibly unique”<sup>8</sup>. It was the first and, therefore, oldest of the English Dukedoms and was created by a Charter of Edward III, commonly called the Charter of Creation, now regarded as an Act of Parliament, dated 17th March 1337. In a dispute which arose between the Duchy and the Crown in connection with the right to Royal Mines in 1883, the Duchy claimed the Charter of Creation represented a “great constitutional settlement”<sup>9</sup>. It was built upon the Earldom of Cornwall which came into existence shortly after the Norman Conquest and whose many possessions it inherited. This, in turn, was based upon the ancient British Earldom of Cornwall. The Duchy has endured despite the many vicissitudes it has suffered which include its abuse by Richard II, the neglect of Elizabeth I and its abolition in the seventeenth century during the period of the Commonwealth. In the eighteenth, nineteenth and twentieth centuries M.P.s have suggested that the revenues of the Duchy of Cornwall and the Duchy of Lancaster should, like the other Hereditary Revenues of the Crown, be surrendered. Their attempts have, so far, been resisted<sup>10</sup>. Even in a country which prides itself on tradition the longevity of the Duchy of Cornwall is remarkable. It

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<sup>8</sup> *Bruton v Information Commissioner, The Duchy of Cornwall and the Attorney General to H.R.H. the Duke of Cornwall* (2011) (EA/2010/0182)

<sup>9</sup> TNA TS 1/14831 - Right to Gold and Silver (1883)

<sup>10</sup> An organisation called Republic has started a campaign to “abolish” the Duchy of Cornwall. See <http://www.republic.org.uk>

continues to perform one of the functions for which it was established, that of providing an income to the heir to the throne being the eldest living son of a reigning monarch<sup>11</sup>.

Its continuance, despite the challenges it has faced, is a consequence of the advantages it obtains arising from the uncertainty of its status. In particular there is confusion over the “peculiar”<sup>12</sup> relationship of the Duchy of Cornwall to the Crown which consequent lack of understanding benefits both the Duchy and the Crown. The legal and constitutional position of the Duchy of Cornwall, as it has developed, can only be fully understood if there is some comprehension of the origins of the Duchy and its legal history. When it was established, in the words of the Duchy itself, it was the “government of Cornwall”<sup>13</sup>. Today it claims it is a “private estate”<sup>14</sup> a largely commercial organisation. That transition will be described as will the current claims made. However, this thesis is not principally a history of the Duchy of Cornwall let alone a history of Cornwall. The focus is the legally significant developments over time enabling a better understanding of the Duchy’s present position.

The Duchy of Cornwall is not “co-existent” with the county of Cornwall. Only “13% of the (land owned by) Duchy of Cornwall is in Cornwall, and only 2% of the land in Cornwall is owned by the Duchy”<sup>15</sup>. Nevertheless the Duchy has a particular relationship with Cornwall which means it enjoys various rights in that county normally the prerogative of the Sovereign.

Mark Stoye posed the question “Are the Cornish English?”<sup>16</sup> He then goes on to describe an “increasingly heated debate” surrounding the subject. Cornwall, for example, “remains the one part of England where not all indigenous inhabitants automatically describe themselves as English”. Dr Bernard Deacon said “Cornish history is a battleground”<sup>17</sup>. It is certainly something which arouses considerable passion. A

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<sup>11</sup> The Sovereign Grant Act 2011 will change this situation such that the Duchy will be used to provide income for the heir to the throne who could be the grandchild of the sovereign or a daughter.

<sup>12</sup> *Rowe v Brenton* (1828) (Concanen Rep 1) p236

<sup>13</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall 1854-1856 - Arbitration by Sir John Patteson (1855)

<sup>14</sup> The Duchy of Cornwall Website [www.duchyofcornwall.org](http://www.duchyofcornwall.org)

<sup>15</sup> Private letter to Mr Colin Murley from Ministry of Justice dated 4<sup>th</sup> June 2010

<sup>16</sup> Stoye, M., *West Britons* (2002) p.1

<sup>17</sup> Deacon, Bernard, *Cornwall – A Concise History* (2007) Introduction



significant minority of Cornish people<sup>18</sup>, sometimes called Kernowcentrics, say Cornwall's history deserves to be studied in the same way as that of Wales and Scotland<sup>19</sup>. Some claim Cornwall is not just another English county and that its constitutional relationship with the Crown and with England has been and continues to be denied. Indeed they go further and suggest there is a "veil of secrecy" which began to descend from 1708<sup>20</sup>. For Kernowcentrics the establishment of the Duchy of Cornwall in 1337 is fundamental because it recognised and continued a constitutional accommodation between Cornwall and the English state and Crown established from, at least, 927 during the time of King Athelstan. For them the Duke of Cornwall has constitutional obligations towards Cornwall which are now ignored except when it is economically advantageous for the Duchy to claim them. They maintain the Duke of Cornwall is "head of state" in Cornwall<sup>21</sup>. The words of the Assistant Boundary Commissioner, Mr G D. Flather Q.C., are quoted who in 1988 said: "...he (Mr Flather) found *de facto* (if not *de jure*) joinder with England"<sup>22</sup>. Cornwall, he is suggesting, is joined with England in fact if not in law. Kernowcentrics claim:

"In 1337...the Monarch surrendered whatever rights and powers he may have acquired in Cornwall and, with the consent of Parliament, Provided that its Heir Apparent be responsible for securing the rights of the Cornish, under the title Duke."<sup>23</sup>

There are others, sometimes called Kernowsceptics, who maintain Cornwall is just another county of England and has been since AD 960 at least<sup>24</sup>, not without interest but with no greater claim to be considered differently than, say, Kent or Durham. The

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<sup>18</sup> The most vociferous of the Kernowcentrics is John Angarrack who has written extensively on this topic, see, for example, his website [duchyofcornwall.eu](http://duchyofcornwall.eu)

<sup>19</sup> There is in fact an increasing body of work devoted to the history of Cornwall as a discrete subject, for example books written by Dr Bernard Deacon and Prof Philip Payton. This process has been assisted by the creation of the Institute of Cornish Studies in Penryn, part of the University of Exeter.

<sup>20</sup> See Article by Biscoe, Bert, "The Duchy is a sovereign land – not private company" *Western Morning News* 5<sup>th</sup> November 2011

<sup>21</sup> Saltern, Ian, *Letter Guardian* 2<sup>nd</sup> November 2011.

<sup>22</sup> TNA AF 1/2159 - Boundary Commission for England: European Parliamentary Elections Act 1978: The Report by Mr Assistant Commissioner G D Flather QC upon local enquiry held on 12/13 July 1988 into proposed Cornwall and Plymouth and Devon Parliamentary Constituencies.

<sup>23</sup> Laity, P., et al *The Reason Why* (2001) p 6

<sup>24</sup> Padel, Oliver, Lecture Royal Institute of Cornwall 13<sup>th</sup> November 2010

Kernowsceptics would agree that: “The Duchy is not Cornwall and Cornwall is not the Duchy”.<sup>25</sup> John Chynoweth argues:

“The examination of the principal assertions which constitute the theory (proposed by Kernowcentrics) of Cornish distinctiveness has shown that each is either erroneous, or requires substantial qualification.”<sup>26</sup>

This study will describe the unusual relationship the Duchy has with Cornwall and demonstrate in one, admittedly, quite narrow sense at least “The Duchy is Cornwall”. It will present evidence challenging important claims made by the Kernowcentrics specifically in connection with the right of the Duke of Cornwall to be consulted on legislation and its right to Crown Immunity while providing some support for the questions raised with regard to the ownership of the land of Cornwall.

The Duchy and Government state it is a “private estate”. This work questions that assertion and argues that as a description of its legal status and, as the term is ordinarily employed, it is an expression without meaning. It proposes that it continues to be used because of the doubt it creates. It will be shown at various times the Duchy claims it is part of the Crown enjoying, for example, the right to be consulted on legislation; at others it is a “private estate” whose records are only available as “a privilege, rather than a right”<sup>27</sup> and claims it is not subject to the Freedom of Information Act 2000<sup>28</sup>. It could be said the Duchy conveniently benefits from the best of both worlds<sup>29</sup>. The decision in *Michael Bruton v The Information Commissioner, the Duchy of Cornwall and the Attorney General to H.R.H. the Prince of Wales*<sup>30</sup> (“**the Bruton Case**”), which is subject to appeal, decided the Duchy is a “public authority” for the purposes of the Environmental Information Regulations 2004.

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<sup>25</sup> Gill, C., (Ed.) *The Duchy of Cornwall* (1987) p 14

<sup>26</sup> Chynoweth, John, *Tudor Cornwall* (2002) p 31

<sup>27</sup> Private letter to writer from Mr Jonathan Crow, Q.C. Attorney General to H.R.H. Prince of Wales 16<sup>th</sup> April 2010

<sup>28</sup> A claim now reinforced by the Constitutional Reform and Governance Act 2011.

<sup>29</sup> See the comments in Philip Hall *Royal Fortune Tax, Money and the Monarchy* (1992) p 125

<sup>30</sup> *Michael Bruton v Information Commissioner, The Duchy of Cornwall and the Attorney General to H.R.H. the Prince of Wales* (2011) (EA/2010/0182)

It is claimed by the Duchy that the Duke of Cornwall has “no constitutional role”<sup>31</sup>. This thesis will provide evidence challenging that contention.

An investigation of itself is not encouraged by the Duchy. Its records are not publicly available. It publishes annual financial statements which are presented to Parliament<sup>32</sup>. Certain financial transactions require Treasury approval before they can proceed<sup>33</sup>. However, despite the fact it has been characterised as a “publicly accountable private estate”<sup>34</sup>, this study will show that while the Duchy exercises considerable power it is not publicly accountable in a way which accords with contemporary expectations.

Initial researches into the Duchy of Cornwall revealed, at that time, no central source which sets out the various important Charters relating to the Duchy and the Stannaries. Appendix C sets out the Charters. The originals were in Latin and the appropriate translations are not without controversy attaching to them.

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<sup>31</sup> Evidence by Sir Walter Ross in *Kirkhope v Information Commissioner and The National Archive* (2012) (EA/2011/0185)

<sup>32</sup> Duchies of Lancaster and Cornwall (Accounts) Act 1838.

<sup>33</sup> Duchy of Cornwall Management Act 1863 - 1982

<sup>34</sup> Haslam G., “Modernisation” in Gill., C., (ed) *The Duchy of Cornwall* (1987) p 48



## **“The Duchy of Cornwall – A Feudal Remnant?”**

### **Introduction**

**“The Duchy of Cornwall is a peculiarly interesting institution with a constitutional status all its own....and which only a few lawyers are competent to deal.”<sup>1</sup>**

For many people the Duchy of Cornwall means, incorrectly, ‘Duchy Originals’, the brainchild of the Prince of Wales<sup>2</sup>, a range of organic products displaying an interesting heraldic device. For others it is one of those quaint historical accretions, part of the weft and weave of English history and its constitution; charming, but no longer important. Indeed it was described as ‘Ruritanian’ in one newspaper<sup>3</sup>. The popular view of the Duchy is far from the reality. It is a substantial organisation<sup>4</sup>: the 2011/12 Accounts show assets valued at more than £728 million<sup>5</sup> producing an income of over £18.2 million per annum for the Prince of Wales. It owns or manages over 53,626 hectares<sup>6</sup> of land mainly in the South West of England, including the Isles of Scilly; 2,135 hectares<sup>7</sup> of woodland; about one third of Dartmoor National Park<sup>8</sup>; around 258 kilometers of coastline<sup>9</sup>; the navigable riverbed of the Tamar; most other Cornish rivers and some rivers in Devon. The properties of the Duchy consist of over 3,500 individual lettings, including 700 agricultural, 700 residential and 1000 commercial agreements<sup>10</sup>. The eldest living son of the monarch, who is heir to the throne, is entitled to the income from the Duchy but may not use the capital. The Sovereign Grant Act 2011 allows that the title Duke of Cornwall will continue to be enjoyed by the “heir to the throne being the eldest living son of the

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<sup>1</sup> Rowse A. L., *West Country Stories* (1945) p 3

<sup>2</sup> Except there is an agreement allowing the use of the Duchy of Cornwall’s coat of arms the Duchy has no interest in or connection with “Duchy Originals” which is a wholly-owned subsidiary of the Prince of Wales’ Charitable Foundation.

<sup>3</sup> *Western Morning News* 29 July 1981.

<sup>4</sup> According to the Sunday Times of 20<sup>th</sup> January 2013 it is the fourth largest landowner in the UK.

<sup>5</sup> Duchy of Cornwall Accounts 31<sup>st</sup> March 2012

<sup>6</sup> Equivalent to 132,518 acres

<sup>7</sup> Equivalent to 5,275 acres

<sup>8</sup> About 28,328 hectares equivalent to about 70,000 acres

<sup>9</sup> About 160 miles

<sup>10</sup> Evidence of Mr Walter Ross in *Bruton v Information Commissioner, the Duchy of Cornwall and Attorney General to H.R.H. the Prince of Wales* (2011) (EA/2010/0182) para. 35

monarch” but the Act provides that the income from the Duchy will be used by the heir to the throne who could be the daughter or the grandchild of the monarch.

The degree to which the Duchy of Cornwall has, until recently, avoided the attention of historians<sup>11</sup>, and has managed to evade, almost entirely, an objective examination of its contemporary legal and constitutional status was an early discovery. Others have commented on this lack of enquiry. For example, in 1927 Dr Mary Coates said:

“There can be few institutions which have so successfully eluded the serious historian as the Duchy of Cornwall... its curious legal relation to the Crown, and to common law..”<sup>12</sup>.

In 1955 L. E. Elliott Binns hoped that “someday someone will undertake a study comparable to that of Robert Somerville on the Duchy of Lancaster.”<sup>13</sup> More than 43 years after Dr Coates presented her paper John Hatcher claimed:

“Miss Coates’ words fell on deaf ears, and the fruits of her excellent but incidental work on the Duchy in the Civil War period and some stimulating but brief mentions by A. L. Rowse comprise virtually the only scholarly writings on its history produced in modern times.”<sup>14</sup>

In 1990 Dr. Rowse wrote, with reference to the Duchy of Cornwall, it:

“..awaits its historian and still needs a treatment comparable to Somerville’s two volumes on the Duchy of Lancaster.”<sup>15</sup>

If the Duchy of Cornwall has managed, until lately, to elude the historian it has been even more successful in avoiding the attention of the lawyer.

This thesis will demonstrate the Duchy occupies a convenient limbo in which it can exploit the benefits of the little understood “isolated constitutional niche”<sup>16</sup> that it inhabits. Without question it is a unique institution fitting no recognisable constitutional

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<sup>11</sup> I would refer readers to the books of amongst others Dr Philip Payton, Dr Bernard Deacon and John Angarrack

<sup>12</sup> Coates, Mary, “The Duchy of Cornwall: Its History and Administration 1640 to 1660” *Transactions of the Royal Historical Society*, 1927 p 135

<sup>13</sup> Elliott-Binns, L.E., *Medieval Cornwall* (1955) p 156

<sup>14</sup> Hatcher, J., *Rural Economy and Society in the Duchy of Cornwall 1300-1500* (1970) p 1

<sup>15</sup> Rowse, A. L., “Review of “The Duchy of Cornwall” Editor Crispin Gill” (1990) *The English Historical Review* 105(416) p. 721

<sup>16</sup> Haslam, G., “Modernisation,” in Gill C., (ed) *The Duchy of Cornwall* (1987) p.48

category. It is not a trust<sup>17</sup> or a corporate body although it shares similarities with both. It oscillates between the Crown and a subject of the Crown, albeit the “greatest of subjects”<sup>18</sup> namely the male heir to the throne being the eldest son of the monarch.

The eminent 17<sup>th</sup> Century jurist, Lord Coke, is claimed to have called the Duchy “a mystery”<sup>19</sup>. This characterisation was repeated over three hundred years later when, on 3<sup>rd</sup> April 2009, the then Duchy Archivist Elisabeth Stuart gave a talk entitled “Historical Aspects of the Duchy of Cornwall”. The leaflet advertising the talk included the following words:

“The Duchy of Cornwall has existed for nearly seven centuries, yet despite this, its existence has appeared over the generations as somewhat mysterious.”

Judges have described the Duchy as “very particular”<sup>20</sup>, and “as one of a very peculiar nature; there is nothing like it existing in this country.”<sup>21</sup>

Sir George Harrison Q.C. wrote in 1837 “(the) peculiar nature of the Revenues of the Duchy of Cornwall was little understood..”<sup>22</sup>. Later in the same work Harrison stated:

“The Duchies of Cornwall and Lancaster in the principles of their constitution are wholly unlike anything else exhibited in the history of this country and wholly unlike each other.”<sup>23</sup>

The law governing the land holdings of the Duchy has been described by the Law Commissioners as recently as 2001 as ‘arcane and complex’<sup>24</sup>. The official web site of the Duchy describes itself as “a well managed private estate”<sup>25</sup>. Professor Philip Payton described the Duchy as “an essentially commercial organisation which manages the

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<sup>17</sup> Duchy accounts state the effect of legislation is “place the Duchy’s assets in trust for the benefit of the present and future Dukes of Cornwall....”

<sup>18</sup> *The Attorney General v The Mayor and Commonalty of the Borough of Plymouth* (1754) (Wight 134) p 1212

<sup>19</sup> HC Debate 25<sup>th</sup> March 1850 Volume 109 cc 1370 -89

<sup>20</sup> *The Attorney General to H.R.H. Prince of Wales, Duke of Cornwall v The Mayor and Commonalty of the Borough of Plymouth* (1754) (Wight 134 ) p 1207

<sup>21</sup> *Rowe v Brenton* (1828) (8 B & C 737) p 152

<sup>22</sup> Harrison, Sir George, *Memoir regarding the Hereditary Revenues of the Crown and the Revenue of the Duchies of Cornwall and Lancaster* (1837) p 6

<sup>23</sup> Harrison, Sir George, *Memoir regarding the Hereditary Revenues of the Crown and the Revenue of the Duchies of Cornwall and Lancaster* (1837) p 8

<sup>24</sup> Law Commission and HM Land Registry Land Registration for the 21<sup>st</sup> Century: A Conveyancing Revolution, Law Com No 271 (2001) p 243

<sup>25</sup> Duchy of Cornwall Web site [www.duchyofcornwall.org/faqs/htm](http://www.duchyofcornwall.org/faqs/htm)

Duke's land in Cornwall and elsewhere.”<sup>26</sup> The view of the House of Commons Select Committee into the Civil List in 1972 was that “The concept that the Duchy is a private estate is misconceived.”<sup>27</sup> Graham Haslam said the Duchy is:

“Not exactly a private company nor a government department, the Duchy became a publicly accountable private estate a paradoxical situation not untypical of the British constitution.”<sup>28</sup>

This paradox was described by Oliver Franks, a past Lord Warden of the Stannaries and member of the Prince's Council, as “either a nonsense or very good sense.”<sup>29</sup> A different view was expressed by Royston Green. He thought the Duchy was “Cornwall's notorious institution of royal exploitation.”<sup>30</sup>

The view of David Burnett, in his “Portrait of a Royal Duchy”, is:

“The Duchy is England in miniature. It is also a kingdom in its own right, a dress rehearsal, which though governed by Parliament offers the Prince a stage on which to express his ideas and beliefs more effectively than likely when crowned king.”<sup>31</sup>

Burnett's opinion is an interesting echo of the claim made by the Duchy in the 19<sup>th</sup> century when they said it was established as “..fitting maintenance for all time of the Heir Apparent...and as a means of training and qualification for the future government of the Kingdom.”<sup>32</sup>

From the descriptions set out above it is clear the views on the Duchy and its status differ widely. This thesis sets out to unravel the “mystery” of the Duchy and explain why it is “peculiar”. Specifically it seeks to examine and explain the contemporary legal and constitutional situation of the Duchy of Cornwall with the aim of clarifying its status and identifying the ambiguities.

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<sup>26</sup> Payton, P., *Cornwall – A History* (2004) p. 78

<sup>27</sup> House Commons, *Report from the Select Committee on the Civil List 1971 -1972* HC29 para. 31

<sup>28</sup> Haslam, op.cit., p 51-52

<sup>29</sup> Franks, O., “The Way Ahead” in Gill. C., (ed) *The Duchy of Cornwall* (1987) p 255

<sup>30</sup> Green R., *What is the Duchy of Cornwall* (1985) section 3

<sup>31</sup> Burnett, D., *A Royal Duchy – A Portrait of the Duchy of Cornwall* (1996) p 9

<sup>32</sup> TNA CRES 58/741 – Arbitration the Seaward Extent of the Duchy of Cornwall (1865)



Today the Duchy and Government both make claims which, it will be demonstrated, are at variance with the decisions of the Courts and contradict contentions the Duchy made for itself in the relatively recent past. It will be argued in this thesis the Duchy maintains the “mystery” and by such means avoids public scrutiny. Specifically it will challenge the description offered by the Duchy and Government that it is a “private estate” and demonstrate that it is not “publicly accountable”.

It would have been of considerable benefit to have access to the archives of the Duchy of Cornwall but they were not prepared to assist. According to the National Archives:

“The Duchy of Cornwall is a large landed estate the archive of which is undergoing extensive cataloguing and conservation. Since it is primarily an internal resource, it is regretted that it is not possible to answer speculative enquiries due to other pressures upon time.”<sup>33</sup>

There is nothing new in the lack of cooperation from the Duchy. Mr. Trelawney M.P. in the House of Commons on 25<sup>th</sup> March 1850 complained, “Lord Coke called the Duchy “a great mystery” and a great mystery they seemed determined it should remain”<sup>34</sup>. In 1921 a question arose regarding various legal entitlements of the Duchy of Cornwall.<sup>35</sup> As part of that correspondence the Office of Woods wrote to the Public Record Office requesting a copy of the Charter which established the Duchy. They said:

“The alternative is to get this from the Duchy. The attitude of that Department as evidenced by past proceedings is not likely to be helpful to me and therefore we must pursue the matter as best we can.”

Later in the same correspondence the Office of Woods stated, in some frustration:

“This Office is heavily handicapped in dealing with the Duchy. Thus little information or letters, and the Duchy has in the past shown itself as disinclined to afford this Office any facilities.”

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<sup>33</sup> TNA Archon Code: 1486 – Duchy of Cornwall Office: Last Amended 20<sup>th</sup> July 2011

<sup>34</sup> HC Deb 25 March 1850 vol. 109 cc 1370-89

<sup>35</sup> TNA CRES 34/49 - Origin of the Duchy of Cornwall’s Right to escheat (1921)

As Royston Green said “The Duchy does not encourage knowledge of itself. Scholars have penetrated little into the extraordinary difficult maze.”<sup>36</sup> The mystification of the Duchy might be dispelled, at least to some degree, if the Duchy archive was made accessible.

Does any of this matter? The Duchy of Cornwall is not merely a quaint hangover from the past - it exercises influence and power. In doing so it is not accountable in a way which we have come to expect from our institutions. It cannot be right that the Duchy should claim to enjoy the benefits of the Crown when it is convenient so to do, particularly when those benefits include Crown Immunity resulting in a privileged tax position and the right to be consulted and give consent to legislation, yet rejects the obligation of disclosure and accountability pleading the Duchy is a purely “private estate” at other times.

For Kernowcentrics<sup>37</sup> the status of the Duchy is fundamentally important. They argue that while the Duchy enjoys the economic benefits of its relationship with Cornwall it is not prepared to accept the obligations which accompany that position<sup>38</sup>.

In addition the fact of its continued existence is interesting in its own right. The way in which it has transformed itself, specifically in the nineteenth century, is remarkable. It is in a more robust condition today than it has ever been. This success has been achieved by the Duchy being jealous of its rights and pursuing them vigorously, avoiding public scrutiny and using terms to describe itself which are either without meaning or highly ambiguous.

## A *Methodology*

The initial interest in this topic arose simply from a desire to have a greater understanding of Cornish history. After reading a book by Prof. Philip Payton entitled “Cornwall - A History”<sup>39</sup> a meeting was arranged with the author at the Institute of Cornish Studies in

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<sup>36</sup> Green, R., *What is the Duchy of Cornwall?* (1985) section 9

<sup>37</sup> Broadly those who claim that Cornwall is constitutionally distinct and has never been part of “England”.

<sup>38</sup> See, for example, Biscoe, Bert, “The Duchy is a sovereign land Not a Private Company” *Western Morning News* 5<sup>th</sup> November 2011 in which he says “The Duchy, in constitutional terms, is synonymous with the territory of Cornwall. It is from its constitutional identity that the Duke derives the right to the income from the estate – today’s Duke has failed to acknowledge this, despite being challenged to do so.”

<sup>39</sup> Payton, P., *Cornwall - A History* (2004)

Penryn, Cornwall. After further enquiries contact was made with people who had a particular interest in matters relating to the Duchy of Cornwall and Cornwall's history and status. The first of these was Mr Colin Murley who, at that time, was involved with the Revived Cornish Stannary Parliament. Mr Murley was and continues to be generous with his time and much valuable material has been exchanged. In particular he provided a set of papers on what has become known as the "Cornwall Foreshore Dispute". Another noteworthy individual with whom there were meetings, exchanges of views and information was John Angarrack who has written extensively on Cornish history and law. There was no underlying strategy in the initial research it was simply a matter of pursuing lines of enquiry which appeared to be of interest. As time passed and more and more material was acquired it seemed sensible to embrace the discipline which academic study involves.

#### Following up references

Even before embarking on this thesis notes were taken of references in any material read and, whenever possible, the original source obtained. The facilities of the North Somerset Library Service were used. Only rarely did they fail to find the material requested some of which were quite obscure. They obtained copies of court cases, magazine articles and of course books. Foreign libraries have been utilised, for example, one document was acquired from The Folger Shakespeare Library in Washington.

#### Searching Data Bases

Interesting results were provided by online services. The search terms used included "Duchy of Cornwall", "Duke of Cornwall", "Cornwall", "Crown Immunity", "Civil List", "Palatine", "Palatine Counties", "Stannaries", "Hereditary Revenues of the Crown" and so on.

The Data Bases consulted were:

Electronic Thesis Online Service (EThOS) useful for unpublished Ph.Ds. which can then be downloaded;

British and Irish Legal Information Institute (BAILII) helpful in searching for court cases and sometimes academic articles;

Parliamentary Papers which has documents dating back to 1685;

Westlaw – A very valuable resource;

LexisNexis – Contains a wealth of information although not a particularly user friendly package to navigate;

Hansard on Line – This data base starts in 1803 and records Parliamentary debates and so on. The Parliamentary deliberations regarding the various Civil List Bills on the accession of a new monarch were a particularly rich source of material apart from the unexpected nuggets a general search revealed; and

Google Books – A number of references, for example, Lewis’ “The Stannaries: A Study of the Medieval Tin Miners of Cornwall and Devon”<sup>40</sup> first published in 1908, which I sought have been digitised and are available without cost online

#### Unpublished Ph. Ds.

While most of the unpublished Ph. D.’s were obtained using EThOS some were more difficult to acquire. An important thesis prepared by Graham Haslam was eventually, with the help from the Librarians at Plymouth University, provided by Louisiana State University.

#### Contacts and Meetings

Contact was made with those who it was thought might be able to assist. In addition to the people already mentioned there was contact with Professor Hatcher now of Cambridge University, Professor Adam Tomkins of Glasgow University and Professor Rodney Brazier of Manchester University.

Andrew George M.P. for St Ives Constituency and Dan Rogerson M.P. for North Cornwall were approached. There have been a number of meetings with Mr. George and much correspondence and he has been kept informed of the progress of this research. At his request Parliamentary Questions were drafted which he has tabled and the replies forwarded after they have been received from Ministers. Lord Berkeley has also been encouraging and has tabled questions in the House of Lords on my behalf.

Mr Pitt Lewis of H.M. Land Registry dealt with my enquiries helpfully and patiently.

#### Cornwall County Archives

They have made available copies of documents and conducted more general searches.

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<sup>40</sup> Lewis, G.R., *The Stannaries: A Study of the Medieval Tin Miners of Cornwall and Devon* (1908)

### Duchy Archives

Although the Duchy of Cornwall has not been prepared to give access, letters were sent to the Attorney General to H.R.H. the Prince of Wales, Mr. Jonathan Crow, Q.C., with a number of specific questions. It has often taken a while to receive a reply but the correspondence has always been courteous and the information useful when it has arrived.

### Parliamentary Archives

This archive has been used extensively. The officials have been very helpful despite the obscurity of some of the questions posed, for example, “when was the first time it is recorded a Duke of Cornwall gave his consent to legislation?” (It was in 1848.)

### British Library

Some of the material which was required was only available from the British Library and they would not release it to a local library. Therefore a British Library Readers Card was obtained followed by a number of trips to London to study the necessary information.

### National Archives

The richest source of data was the National Archive. It is a facility which does not appear to have been utilised by those who have been engaged in researching Cornwall or the Duchy of Cornwall.

The terms entered into the search facility included:- Duchy of Cornwall, Cornwall, Duke of Cornwall, Cornwall – Foreshore, Royal Taxation, Law Officers Opinions – Cornwall and so on. To give some indication of the size of the task the search term “Duchy of Cornwall” produced 2408 hits. It was then a question of going through the “hits” to try to establish, from the file names, files which may be of interest. This took a great deal of time. Having identified a document an estimate of the cost of photocopying the record was requested. If that was reasonable the papers were ordered and eventually arrived in the post. Often having received the folder it was discovered it was not relevant to this study. Equally documents were received which were unexpectedly interesting and valuable.

In many cases the costs of photocopying was not affordable. The combined estimate of reproducing a series of documents relating to the Civil List was in excess of £10,000. In those circumstances it was obviously more economic to visit the National Archive at Kew and order the papers to be viewed.

Freedom of Information Act 2000 (FOIA)/Environmental Information Regulations 2004 (EIR)

The rights offered under the FOIA and EIR, in theory, offer an attractive new facility to researchers. However, the practical experience of using the Act and Regulations can be deeply frustrating as the following examples will demonstrate.

The Duchy is entitled to be consulted on proposed legislation which affects its “hereditary revenues, personal property and other interests”. How the process works in practice was of interest. Using the FOIA a letter was sent to every Department and Ministry of State asking the number of times the Duchy had been consulted for the period 2005 - 2011. Having established when the Duchy had been approached, again using the FOIA, a request was made to see a copy of the correspondence between the Duchy and the Department concerned. Section 10 of FOIA provides that a reply should be sent to an applicant within twenty working days. Every request was met with a refusal. Under the FOIA the reasons for the denial were the exemption under section 37 of FOIA which deals with “Communications with the Royal Household”, section 40 which deals with exemptions for “Personal Information” and section 42 “Legal Professional Privilege”. The reasons given for rejection under the EIR were regulation 12(5)(d) “confidentiality of proceedings”, regulation 12(5)(f) “interests of the provider of information and regulation 13(1) “Personal Data”. Before a complaint can be made to the Information Commissioner the authority that has refused a request must be asked to conduct an internal review. This was done and in every case the decision remained the same confirming the original refusal. Only after an internal review, to which a response is also supposed to be made within twenty working days, is it possible to make a complaint to the Information Commissioner.

The following are examples of the procedure in practice:

*Department for Environment, Food and Rural Affairs (DEFRA)*

An initial request was made to DEFRA on 16<sup>th</sup> August 2010 for information in connection with the Marine and Coastal Access Bill. An acknowledgement was received on 14<sup>th</sup> September 2010 in which DEFRA asked for an extension of the time limit. A reply to the request eventually arrived on 7<sup>th</sup> December 2010 refusing to release the documents. On 22<sup>nd</sup> December 2010 DEFRA was asked to conduct an internal review. A response was sent by the Department on 3<sup>rd</sup> March 2011 confirming the original decision. A complaint was made to the Information Commissioner on 14<sup>th</sup> March 2011. The Commissioner upheld the complaint in a Decision Notice dated 8<sup>th</sup> February 2012<sup>41</sup>. It had taken nearly sixteen months from the date of the first request to receiving a decision from the Commissioner and at every stage the statutory deadlines have been exceeded. The correspondence has now been produced.

#### *The National Archive*

There is a closed file at the National Archive “IR 40/16619 – Liability of the Duchy of Cornwall to tax: covering dates 1960-62”. An application was made on 15<sup>th</sup> February 2010 that it be opened which was on 30<sup>th</sup> March 2010 refused. An internal review was requested on 10<sup>th</sup> April 2010. This was, by e mail dated 19<sup>th</sup> August 2010, also refused. A complaint was sent to the Information Commissioner on 4<sup>th</sup> September 2010. On 26<sup>th</sup> July 2011 the Commissioner issued a Decision Notice<sup>42</sup> supporting the refusal of the National Archive. It was decided to appeal to the First Tier Tribunal (Information Rights).

Preparing for the case was hugely time consuming. For example, the document bundles amounted to seven volumes. It was finally set down for hearing on 7/8<sup>th</sup> February 2012 and adjourned until 23 May 2013<sup>43</sup>. For over half the hearing the complainant and his counsel were excluded from the Court since the Court was considering evidence in relation to the document to which the complainant had been refused access. The case has now been concluded with the Tribunal rejecting the appeal and supporting the Information Commissioners decision. The decision is reproduced in Appendix M.

#### *Other experiences*

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<sup>41</sup> Information Commissioner Decision Notice FER0380352

<sup>42</sup> Information Commissioner Decision Notice FS50348825

<sup>43</sup> *Kirkhope v Information Commissioner and National Archive* (2012) (EA/2011/0185)

In contrast to the above examples a request made to the Crown Estate produced copies of a file dealing with a period of over forty years. Similarly papers were provided by the Department of Community Affairs within a very few days of the request being made.

### *Requests made*

In addition to all the Departments of State and the Crown Estate requests were also made to the House of Commons and Her Majesty's Customs and Excise. Of particular note are the requests which were made to the Cabinet Office for any material they held in connection with the Duchy of Cornwall's right to give consent to legislation and the application of Crown Immunity. They refused to provide the information and appealed the decision of the Information Commissioner that they should provide the documents. The information, albeit in redacted form, was eventually forwarded. The Cabinet Office then changed its website to say "Cabinet Office to publish guidance about producing legislation"<sup>44</sup>. The web page contains the following quotes:

"We...want to help people learn how legislation is prepared, and how Parliament considers it. I hope these publications will bring to light a subject that has often appeared more obscure than it ought to be." (Richard Heaton, First Parliamentary Counsel and Cabinet Office's Permanent Secretary)

Andrew Lansley, M.P., Leader of the Commons said:

"We are seeking to make Parliament more accessible and this information about how legislation is prepared will complement that and enhance public understanding of law making. I very much welcome the OPC initiative."

In the light of the time it took to obtain the information and the degree to which the Cabinet Office resisted publication the dramatic about turn is surprising.

### *Conclusion*

The FOIA and EIR have resulted in interesting material being made available but it is no panacea. The process can be lengthy and frustrating requiring considerable investment of time and money. The responses from the various Ministries and Departments show there is no consistency of approach.

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<sup>44</sup> <http://www.cabinetoffice.gov.uk/news/cabinet-office-publish-guidance-about-producing-legislation>



It should also be noted the Constitutional Reform and Governance Act 2010 has amended FOIA section 37, which deals with “Communication with the Royal Household”, so that it is now an absolute exemption. There is no public interest test. So the enquiries outlined above in relation to the Duchy would no longer be possible. A process already opaque has become more so.

#### Contacts made by others

The media interest which has been generated by the FOI requests made in the course of this research has been totally unexpected. Numerous articles have appeared in the UK press and it generated radio interviews. To give some indication a Google search “John Kirkhope Duchy of Cornwall” produced 147,000 hits.

In addition from time to time there have been approaches by lawyers and others who are involved with some matter concerning the Duchy and who have asked for help. When time has permitted assistance has been provided but on the basis of reciprocity.

The misuse of the results of the research and the lack of acknowledgement has been surprising as has the lack of redress when one is misquoted on the internet.

#### Web Sites

Today everyone has a web site. There are five in particular which have been consulted as follows:

savecornwall.org a site operated by Mr Murley;

cornishstannaryparliament.co.uk the site operated by the Revised Cornish Stannary Parliament;

duchyofcornwall.eu run by Mr. John Angarrack;

Duchyofcornwall.org, the official site of the Duchy of Cornwall; and

duchyoflancaster.com, a similar site for the Duchy of Lancaster.

#### *B Literature Review*

The focus of this thesis changed, as new information emerged, during the research process. This is reflected in that fact that since starting the proposed title of the treatise has altered three or four times. It means that material initially thought significant assumed less importance as investigations continued and vice versa. The following are a number of general conclusions.

The Duchy of Cornwall was unexpectedly elusive. It is mentioned, from time to time, in works of history as an aside particularly in connection with the Black Prince. There are relatively few books, articles and academic papers devoted solely to the Duchy of Cornwall. Those that do exist are written by historians or those who wish to promote a particular view point typically the Duchy of Cornwall's relationship with Cornwall. As far as can be established the only book by a lawyer was the one, to which reference has already been made, written in 1837 by Sir George Harrison.

The works either devoted to the Duchy or to the history of Cornwall fail to place the Duchy in context. A number of writers make much of the creation of the Duchy of Cornwall and the "fact" that the Duchy, which grew out of the Earldom of Cornwall, was the government of Cornwall. They fail to mention, for example, the Dukes of Cornwall were also Earls of Chester, an undoubted Palatine County, in which the Duke exercised greater power. Similarly while there is much discussion of the Stannary Law of Cornwall there is little reference to the fact that parts of Devon had their own Stannary Law and other areas which had similar mining laws including, for example, the Mendips, the Forest of Dean and Derbyshire.

The wealth of information which lay undiscovered was unexpected. There is a lot of reference to the "Cornwall Foreshore Dispute" but no indication of the fact that this was one of a number of disagreements, and not necessarily the most interesting. None of the others are mentioned, with the exception of the "right of wreck"<sup>45</sup> in any of the works that have been consulted. The information is available in the National Archives and simply required persistence, diligence and organisation to unearth. Similarly there are a wealth of court cases which shed light on the Duchy which are not mentioned anywhere in the literature consulted as part of the research for this thesis.

Finally the reality of the Duchy belies its quaint benign image. Even after six hundred and seventy years it is still a vehicle which exercises influence and power. It is consulted on and gives consent to legislation affecting its interest. There has been no research which has examined the basis upon which these rights are founded, how often they have been exercised or any attempt to understand how the process works in practice.

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<sup>45</sup> Pearce, C., *Cornish Wrecking* (2010) pp 182 - 185

## The Elusive Duchy and the theory of “Cornish Distinctiveness”

A J P Taylor said:

“England....meant indiscriminately England and Wales; Great Britain; the United Kingdom; and even the British Empire.”<sup>46</sup>

Clearly things have developed since Taylor made the above observation. Cornwall is one of those areas which has benefitted from that change. That is not to say there have been no books on the history of the County in the past. Richard Carew wrote his survey of Cornwall<sup>47</sup> in the sixteenth century, Polwhele published his “History of Cornwall” in the nineteenth century<sup>48</sup> and so on. There has been a steady stream of academic papers and theses which are set out in the bibliography. It is fair to say the interest in the history of Cornwall has increased and, as a result, there have been a number of books published directed at the general reader. This trend started with A. Jenkin<sup>49</sup> and A. L. Rowse<sup>50</sup> and continues with writings by, for example, Philip Payton<sup>51</sup>, Bernard Deacon<sup>52</sup>, Mark Stoye<sup>53</sup> and John Angarrack<sup>54</sup>. A growing interest in our ancestors, evidenced by the popularity of family history, and the establishment of the Institute of Cornish Studies by the University of Exeter are two drivers of this increased interest. The fact that Cornwall has become “fashionable” is also clearly significant. There is the discovery, or, maybe, more accurately a rediscovery of Cornwall’s difference and its sometimes fraught relationship with England. It is, after all, the only county with its own independence party<sup>55</sup> and a campaign for an Assembly<sup>56</sup>. The fierce debate about the history of Cornwall is evidenced not only in the books written by individuals like John Angarrack but in the various web sites devoted to the subject and papers produced by people like Colin Murley<sup>57</sup> and others. This thesis focuses on the legal history of the Duchy, including its relationship with Cornwall, in order to provide a basis to enable a better

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<sup>46</sup> Taylor, A. J. P., *English History 1914-1945* (1975) volume XV page v

<sup>47</sup> Carew, R., *The Survey of Cornwall* (1602)

<sup>48</sup> Polwhele, R., *History of Cornwall* (1816)

<sup>49</sup> Jenkin, A.K.H., *The Story of Cornwall* (1945)

<sup>50</sup> Rowse, A. L., *Tudor Cornwall* (1941), *West Country Stories* (1945)

<sup>51</sup> Payton, P., *The Making of Modern Cornwall* (1992) *Cornwall – A History* (2004)

<sup>52</sup> Deacon, B., *Cornwall – A Concise History* (2007)

<sup>53</sup> Stoye, M., *West Britons – Cornish Identities and the Early Modern British State* (2002)

<sup>54</sup> Angarrack, J., *Breaking the Chains* (1999), *Our Future is History* (2002) *Scat t’Larrups* (2008)

<sup>55</sup> Mebyon Kernow

<sup>56</sup> [www.cornishassembly.org](http://www.cornishassembly.org)

<sup>57</sup> [www.savecornwall.org](http://www.savecornwall.org), [www.duchyofconrwall.eu](http://www.duchyofconrwall.eu) and [www.thisisnotengland.co.uk](http://www.thisisnotengland.co.uk) for example

understanding of the contemporary status of the Duchy. It should always be borne in mind that while the Duchy had, and still has an intimate relationship with Cornwall, its property and interests spread beyond that county.

The following summary of the arguments advanced by the various proponents will give context to some of the material which follows. There are those (“Kernowsceptics”) who say Cornwall became part of “England” from at least the mid tenth century. The most notable of these are Bernard Deacon<sup>58</sup> and John Chynoweth<sup>59</sup>. The latter, in particular, specifically challenges the claim to “Cornish Distinctiveness” in his book “Tudor Cornwall”. Their proposition is that Cornwall was not without its differences which were acknowledged and accommodated. However, it was absorbed, over time, into the English state in the same way as the other counties of England. As for the differences: Kent, Chester, Durham could make similar claims and yet no one today would suggest they are anything other than English counties.

Others, for example, John Angarrack and Councillor Bert Biscoe, (“Kernowcentrics”) take a radically different view. They assert Cornwall was never absorbed into the English state. Cornwall’s constitutional position, they claim, is similar to that of the Isle of Man and that it should properly be described as a Crown Dependency. For example:

“Even a cursory examination will reveal that both the governance and legal identity of Cornwall lie within the jurisdiction of the Duchy of Cornwall...Therefore in a strictly legal sense Cornwall is not a county of England but an administrative entity falling within the Duchy of Cornwall.”<sup>60</sup>

They go further and argue the true history of Cornwall has been ignored and even hidden and that there is a “conspiracy” to hide the truth which has been perpetuated over many years. According to Mr. Biscoe from about 1708 “...a veil of secrecy slowly descended.”<sup>61</sup> Even more graphically it is claimed that “...the Duke of Cornwall and

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<sup>58</sup> Deacon, B., *Cornwall – A Concise History* (2007)

<sup>59</sup> Chynoweth, J., *Tudor Cornwall* (2002) pp 21 – 31 and *The Gentry of Tudor Cornwall* (1994) Thesis (Ph.D.) University of Exeter.

<sup>60</sup> [www.duchyofcornwall.eu/latest](http://www.duchyofcornwall.eu/latest)

<sup>61</sup> Biscoe, Bert, “The Duchy is a sovereign land – not a private company” *Western Morning News* 5<sup>th</sup> November 2011

(England) have plundered our (Cornwall's) resources and trampled on our (the Cornish People's) rights.”<sup>62</sup>

The significance of the Duchy of Cornwall depends upon which side in the historical debate one takes. For Kernowsceptics the Earldom and the later Duchy are indicators of difference and part of the recognition that Cornwall's particular situation had to be accommodated. For Kernowcentrics the Duke of Cornwall was made “sovereign” of Cornwall which was an acknowledgement that Cornwall like Wales was distinct and not absorbed within the English state. Accordingly the Duke of Cornwall is ““head of state” in Cornwall.”<sup>63</sup> Angarrack argues that the Duchy of Cornwall does not have an interest in the land of Cornwall: it is owned “allodially”. That is to say the Duke of Cornwall, like the Queen in the rest of England and Wales, but not Scotland, owns the land of Cornwall rather than having a freehold interest in the land. A distinction that shall be explained later in this work.

There are, inevitably, writers who take a middle ground. They claim the history of Cornwall is distinct and worthy of study in its own right, but would not go as far as the Kernowcentrics in their claims for a special constitutional status. They point out and examine points of difference. Among the best known is Mark Stoye who says:

“A fierce sense of distinctiveness has always characterized the inhabitants of Cornwall.....For centuries speakers and writers of English have gone out of their way to pour cold water on the suggestion that Cornwall might be anything other than an integral part of England.”<sup>64</sup>

Stoye goes on to say:

“Cornwall's political position has been anomalous and unclear, the region forming a semi-autonomous province, which was neither wholly part of what would later become England nor wholly separate from it.”<sup>65</sup>

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<sup>62</sup> Laity, P., et al *The Reason Why* (2001) p 22

<sup>63</sup> Saltern, I., “Letters Prince Charles' secret fiefdom” *Guardian* 1<sup>st</sup> November 2011. See also Mills, J., “Genocide and Ethnocide: The Suppression of the Cornish Language” in Partridge, J., (Ed.) *Interfaces in Language* (2010) p 193 “From 1337 Cornwall, regarded as a separate province was administered as a palatinate known as the Duchy of Cornwall, whose sovereign was and still is the Duke of Cornwall.”

<sup>64</sup> Stoye, M., “The Dissidence of Despair: Rebellion and Identity in Early Modern Cornwall” (1999) *Journal of British Studies* Vol 38 No 4 p 424

<sup>65</sup> *Ibid* p 427

He explains, by way of illustration, that during the Civil War when Cornwall supported the Crown the Cornish were referred to as a “foreign nation” and terms such as “invasions” and “frontiers”<sup>66</sup> were used in reference to the County.

Professor Philip Payton of the Institute of Cornish Studies is, probably, the best known figure in the field of Cornish studies and has written extensively on the topic. He explains that:

“...while drawing Cornwall tightly into the mechanisms of the English state the Stannaries’ (and Duchy) also afforded Cornwall a high degree of constitutional individuality, both deferring to and reinforcing a distinct Cornish identity.”<sup>67</sup>

Payton relies heavily and quotes extensively from the Duchy submissions in connection with a dispute arising in 1855 in which they said “the Duke was quasi sovereign in his Duchy” and “from earliest times Cornwall was distinct from the Kingdom of England and under separate government.”<sup>68</sup> It is suggested by Payton that with the emergence of the English state the histories of other peoples of the British Isles were marginalised. Furthermore, he claims, the relationship between England and Cornwall was “complex and has yet to be teased out fully.”<sup>69</sup> He then says:

“...the institution of the Duchy of Cornwall..which bound Cornwall tightly into the needs and imperatives of the English state.....was a powerful mechanism of constitutional accommodation which allowed Cornwall a considerable degree of political autonomy. Cornwall was bound closely to the English state but in an important sense was not actually an integral part of it.”<sup>70</sup>

It is clear that the history of Cornwall and its relationship with England both in the past and at present is subject to lively and continuing debate. There is much which makes Cornwall and the Duchy of Cornwall a fascinating study. However the existing studies lack context and comparison. There are many claims made for Cornish Stannary Law, for example, often to reinforce the assertions of Cornwall’s differences from England.

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<sup>66</sup> Stoye, M., “Pagans or Paragons? Images of the Cornish during the English Civil War” (1996) *The English Historical Review* Vol 111 No 441 p319

<sup>67</sup> Payton, P., *A Vision of Cornwall – Duchy Originals* (2002) p 72

<sup>68</sup> *Ibid* p 80

<sup>69</sup> Payton, P., *Cornwall – A History* (2004) p 71

<sup>70</sup> *Ibid*

However, only rarely do you see reference to the fact that many areas devoted to mining had particular sets of customs and laws and more than one had “miners parliaments”, for example, the Forest of Dean and Devon. The Stannaries’ of Devon are hardly mentioned and, when they are, the differences are highlighted but the similarities ignored.

The first Duke of Cornwall, Edward the Black Prince, was also Earl of Chester, later Prince of Wales and finally Prince of Aquitaine. His Council was responsible for administering a significant proportion of the Kingdom. As Earl of Chester, a Palatine County, he and later Earls could issue writs in their own name unlike Cornwall where, although writs were returned to the Duke they were issued in the King’s name. The title Duke might have been granted to emphasise that the heir to the throne “outranked” the various Earls created by Edward III; it did not necessarily give greater powers than the Earldom already held by the Black Prince and his successors as Duke. It is never possible to do exact comparisons. However, there is no work that tries to place the Duke of Cornwall’s powers in Cornwall and elsewhere alongside that of the other titles enjoyed by them to see whether the position enjoyed by the Dukes of Cornwall was that remarkable or different.

There is much disagreement surrounding the fact the Duchy of Cornwall is described by itself and Government as a “private estate”. There has been no research to place this dispute within the context of the more general struggle between the Crown and Parliament for the control of finances and the Hereditary Revenues of the Crown.

One purpose of this thesis is to give some context to the claims made for Cornwall and the Duchy of Cornwall to gain a clearer understanding of their position.

#### New material

It was a surprise to discover much of the evidence cited to support the claims for Cornish difference and the position of the Duchy of Cornwall was simply wrong. For example, it is argued that because the Duchy is consulted and gives consent to legislation which affects its “hereditary revenues, personal property and other interests” and the fact that it has Crown Immunity supports the thesis of the distinct situation of Cornwall in relation to the English state. Yet the evidence, readily available in the National Archives and House

of Commons Archives, clearly demonstrates these were relatively recent innovations and were about the Duchy securing a financial advantage, in particular, the avoidance of tax.

There are works devoted solely to the Duchy. To give just a few examples; Richard Connock wrote an “Account of the Duchy of Cornwall written for Henry Prince of Wales” in 1609<sup>71</sup>. Four years later in 1613 Sir John Davies prepared an “Essay on the Rights of the Prince of Wales Relative to the Duchy of Cornwall”. In more recent times there is the essay presented by Mary Coates in 1927<sup>72</sup> and there have been a number of works by A. L. Rowse. On the six hundred and fiftieth anniversary of the Duchy in 1987 C. Gill edited “The Duchy of Cornwall”<sup>73</sup> with several contributors some of whom had associations with the Duchy. Burnett in 1996 produced a richly illustrated book entitled “A Royal Duchy”<sup>74</sup>. The author who has written with most authority on the Duchy is Graham Haslam. His thesis written in 1975 was called: “An administrative study of the Duchy of Cornwall 1500 to 1650”<sup>75</sup>. He also contributed chapters to the book edited by Gill and an essay in 1992 to “The Estates of the English Crown 1558-1640”<sup>76</sup>. The works specifically devoted to the Duchy contain much which is of interest to the lawyer, particularly that of Haslam, but they are not books of legal analysis nor do they claim to be.

## C Conclusion

The Duchy is worth nearly three quarters of a billion pounds and produces income of over eighteen million pounds a year. It has influence and power and enjoys a panoply of right and privileges. It has not been subject to the scrutiny its position would otherwise attract. This thesis will help illuminate the otherwise obscure workings of the Duchy. The basis upon which the Duchy makes various claims, particularly that of Crown Immunity, will come in for critical examination and challenge. Those works which have considered the Duchy have ignored a great deal of material which is publicly available and which

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<sup>71</sup> Connock, R., *Account of the Duchy of Cornwall written for Henry Prince of Wales* (1609) available from the British Library.

<sup>72</sup> Coates, Mary, “The Duchy of Cornwall: Its History and Administration 1640 to 1660” (1927) *Transactions of the Royal Historical Society*

<sup>73</sup> Gill, C., (Ed.) *The Duchy of Cornwall* (1987)

<sup>74</sup> Burnett, D., *A Royal Duchy – A Portrait of the Duchy of Cornwall* (1996)

<sup>75</sup> Haslam, G., *An Administrative Study of the Duchy of Cornwall 1500 to 1650* (1975) Thesis (PhD) Louisiana State University

<sup>76</sup> Hoyle, R. W., *The Estate of the English Crown 1558 – 1640* (1992)



sheds new light on this extraordinary institution. The conclusions reached by various writers will have to be reconsidered taking into account the information this document provides. Specifically those who are proponents of “Cornish Distinctiveness” will find many of their arguments undermined after considering the comparisons with Palatine Counties.

There have been no recent studies attempting to set out the legal history of the Duchy of Cornwall and to analyse the contemporary legal position of the Duchy. Nor have any works conducted such a systematic investigation of the records, particularly the National Archive records, or of the cases and statutes which have application to the Duchy.



## **PART 1**

### **The Origin and Evolution of the Duchy of Cornwall**



## Chapter 1

### The Background to the Creation of the Duchy of Cornwall

1066 – 1337

*“Cornwall, as an entire state, hath at divers times enjoyed sundry titles: of a kingdom, principality, duchy and earldom..”<sup>1</sup>*

#### A Introduction

This is not primarily a work of history: however, the background to the legal history is vital for an understanding of the Duchy of Cornwall’s contemporary property and constitutional rights and its relationship to Cornwall. The difficulty, of course, is where to begin: with the Romans possibly or maybe the Anglo Saxons? The focus will be the period following the Norman Conquest for two reasons. First, because the time prior to the Norman invasion is subject to a great deal of controversy amongst those involved with Cornish studies which, while interesting, does not add substantially to this thesis. Next 1066 is recognised as representing a break with the past and the beginning of a new era in English history. However, a brief exploration of the period before the Conquest is helpful.

#### B Cornwall and the Anglo-Saxons

The geography of Cornwall is important. It is a “land apart”<sup>2</sup>, a “natural and self contained geographic unit”<sup>3</sup>: an isolated peninsula some eighty miles from east to west and forty miles north to south at its widest point along the Devon border. It is surrounded on three sides by water, the English Channel, the Celtic Sea and the Atlantic Ocean. No part of Cornwall is more than 18 miles from the sea. The River Tamar separates Cornwall from Devon for all but eleven miles or so of the county border. The interior is dominated by granite moors, most famously Bodmin Moor. John De Grandisson soon after his appointment as Bishop of Exeter in 1327 wrote to friends explaining it was “not only the

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<sup>1</sup> Carew, R., *The Survey of Cornwall* (First published 1602) ( Republished 1953) p 151

<sup>2</sup> Stoye, M., *West Britons* (2002) p 9

<sup>3</sup> Payton, P., *Modern Cornwall: The Changing Nature of Peripherality* (1989) Thesis (PhD) University of Plymouth p 77

ends of the earth but the very ends of the ends thereof”<sup>4</sup>. It was regarded as a remote and unwelcoming land. Sir John Dodridge described it, almost poetically, in his book first published in 1630 as follows:

“The uttermost part of this Island towards the West stretching itself by a long extent into the Ocean, is the County called Cornwall; lying against the Dutchy of Bretagne in France. The people inhabiting the same are called Cornish-Men and are also reputed a Remnant of the Britain’s, the Ancient Inhabitants of this Land.”<sup>5</sup>

Cornwall, like Wales, is on the periphery. Like Wales the Romans made some, but very few inroads: they would seem to have been more interested in trade largely in tin than in occupation. Similarly for a long time Cornwall resisted the advance of the Anglo Saxons. The Cornish were called the “West Welsh” and Cornwall “West Wales”. As Bernard Deacon explained: “In southern Britain, only Cornwall along with Wales was able to resist “anglo-saxonisation”.<sup>6</sup> However, it is recorded the Anglo-Saxons under King Egbert in 815 harried Cornwall from end to end<sup>7</sup>. Apparently in 830 he led an army against the Welsh and “reduced them in humble submission to him.” A combined Cornish and Danish army were defeated in 838 by the forces of Egbert at the battle of Hengistdun (Hingston Down) which was a significant turning point in Cornwall’s relationship with the developing English state. For some this represented the end of Cornish independence<sup>8</sup>. While Cornwall was not “occupied” and was allowed to keep its native rulers for at least the next 100 years it came under the influence and the control of the Anglo-Saxons from the ninth century. However power was fluid: that which was gained by one king could be lost by another. Certainly there was an accommodation between the Anglo-Saxons and the Cornish from 838 to 927. Possibly because the Anglo-

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<sup>4</sup> “*Et ecce, Pater dulcissime, dum nedum in mundi finibus, set – ut ita dicam – in finium finibus consisto*” (Reg. Grandisson, I 97-98)

<sup>5</sup> Dodridge, Sir John, *An Historical Account of the Ancient and Modern State of the Principality of Wales Dutchy of Cornwall and Earldom of Chester* (1714) p 78

<sup>6</sup> Deacon, B., *Cornwall – A Concise History* (2007) p 4

<sup>7</sup> Anglo-Saxon Chronicle for 813. *Crawford Charters* (ed Napier and Stevenson) 18f, 106f

<sup>8</sup> Elliott-Binns, L.E., *Medieval Cornwall* (1955) p.48

Saxons were distracted by the Viking threat<sup>9</sup> they did not press their military gain. In any event the extension of power of the Anglo Saxon kings was not a smooth steady affair.

King Athelstan attacked the south western Celts in 927 forcing their withdrawal from Exeter. There does not appear to be any record of his pursuing his campaign into Cornwall. It is probable it was agreed that tribute be paid thus avoiding further attacks and ensuring a high degree of autonomy of the native Cornish rulers. It was Athelstan who decided the border of Cornwall should extend to the bank of the River Tamar which has remained substantially unchanged ever since<sup>10</sup>.

Why did the Anglo-Saxons never press their advantage? It is suggested there was recognition that the Tamar:

“..marked the boundary between two peoples, and should remain so – and this was accepted at the Norman Conquest, the Domesday Book (for example) noting the Tamar without question.”<sup>11</sup>

A number of other theories have been put forward: because land in Cornwall was poor and not worth the effort; because the Cornish were particularly adept at trade and diplomacy; because the Cornish were irritating but not irritating enough; because the Cornish posed no real threat; or, as set out above, because the Anglo-Saxons were preoccupied with the Viking threat<sup>12</sup>.

The Cornish: “As long as they recognised the sovereignty of the English Crown were left with considerable autonomy within a recognised homeland.”<sup>13</sup> Jenner expressed it thus: “From Athelstan’s time the rulers of Cornwall seem to have been called Earls and to have generally allied themselves with the Saxons”<sup>14</sup>. In fact the Anglo-Saxon Chronicles from the eighth century refer increasingly to “ealdormen” most frequently as the commanders of armies from specific districts or shires<sup>15</sup>. The Earl was responsible for the administration of justice and leading the armies of the shire. Cornwall on the eve of the

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<sup>9</sup> Deacon, op.cit. p 21

<sup>10</sup> For a fuller examination of the Devon and Cornwall Boundary and its variation over time see Alexander, J.J., “The Devon-Cornwall Boundary” (1928-1929) *Devon and Cornwall Notes and Queries* Volume XV pp 270 - 274

<sup>11</sup> Thorne, Caroline and Frank, (eds.) *Domesday Book – Cornwall* (1979) p 152

<sup>12</sup> Deacon, op. cit. p 20

<sup>13</sup> Deacon, op.cit. p 21

<sup>14</sup> Jenner, H., “Cornwall a Celtic Nation” (1905) *Celtic Review* Vol. 1 Part 3 pp 234-236

<sup>15</sup> Lyon, Ann, *Constitutional History of the United Kingdom* (2003) p 5

Norman Conquest was “a recognisable geo-political entity accommodated within the consolidating English state”<sup>16</sup>. Stoye says:

“...from the very beginnings of British history, Cornwall’s political position has been anomalous, unclear, the region forming a semi-autonomous province, which was neither wholly part of what would later become England nor wholly separate from it.”<sup>17</sup>

Cornwall was not unique in its position with reference to the English state. For example, under Cnut (1016-1035) Northumbria was also governed by Earls who enjoyed “virtual independence and hereditary office.”<sup>18</sup> A. L. Rowse simply said:

“...it (Cornwall) was a conquered country when the Saxons themselves were conquered by William of Normandy.”<sup>19</sup>

Michael Woods concluded:

“The process of colonisation was emphasised by Athelstan around 930 when he deported British speakers across the Tamar, which was fixed as the border of the Cornish. They were left under their own dynasty to regulate themselves with West Welsh (Cornish) tribal law and customs; rather like Indian princes under the Raj.”<sup>20</sup>

This ambiguity remains and debate regarding the status of Cornwall during the period of the Anglo-Saxons continues.

### *C Cornwall after the Conquest*

William vigorously asserted royal power. His tenants in chief had no more power than he was prepared to grant them. He made his half brother Odo Earl of Kent; new earldoms were created along the Welsh border and there was an Earldom formed for Northumberland. All the Earldoms established by the Conqueror were in places where he felt he might be vulnerable. It is generally agreed the first post-conquest Earl of Cornwall

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<sup>16</sup> Payton, P., *Cornwall - A History* (2004) p 69

<sup>17</sup> Stoye, op. cit. p 13

<sup>18</sup> Lyon, op. cit. p 14

<sup>19</sup> Rowse, A. L., *The Little Land of Cornwall* (1986) p 41

<sup>20</sup> Wood, M., *Domesday* (1986) p.188



was one Brient or Brian fitz Eudo of Brittany<sup>21</sup> who displaced any native British ruler and appears to have held the title from 1068 until about 1076. Cornwall it is said “resembled a palatinate, a territory subject to the jurisdiction of a feudal lord who possessed local authority normally belonging only to the sovereign.”<sup>22</sup>

William the Conqueror subsequently granted full possession of Cornwall to his half brother Robert, Earl of Mortain. Robert was the greatest landlord in England after the King with eight hundred manors in 20 counties<sup>23</sup>. Two hundred and forty eight Cornish manors were granted to Robert who in turn made grants to his Norman supporters which brought them into Cornwall with their servants and tenants<sup>24</sup>. He was given the important right, normally the preserve of the King, to appoint the Sheriff for Cornwall.

The installation of Brian and Robert was a shrewd move by the Conqueror. They were both Bretons and their appointment recognised the close link between Brittany and Cornwall not least the languages which were very close<sup>25</sup>. William the Conqueror did seem to recognise that Cornwall was somehow distinct and that the difference should be recognised. Payton has claimed that the Earldom of Cornwall was a “singular institution and was probably created as an “accommodating” successor to the earlier line of Cornish kings..”<sup>26</sup>

William, the son of Earl Robert, succeeded his father but forfeited his possessions by joining in rebelling against Henry I. Although Robert and William are given the title of Earl of Cornwall by later writers they never assumed the title nor is it applied to them in any document<sup>27</sup>.

There is some debate about the succession to the Earldom. However it is clear that the title was retained in the Crown until it was granted to Alain of Brittany (a Breton again) and subsequently to Reginald de Dunstanville, the natural son of Henry I. It is noteworthy in about 1173 when Earl Reginald granted freedoms and privileges to the burgesses of

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<sup>21</sup> Tait, J., “The First Earl of Cornwall” (1929) *The English Historical Review* Vol. 44 No 173 p.86

<sup>22</sup> Deacon, op. cit. p 23

<sup>23</sup> Halliday, F. E., *A History of Cornwall* (1959) p 117

<sup>24</sup> Chynoweth, J., *Tudor Cornwall* (2002) p 21

<sup>25</sup> Williams, N., *Writings on Revived Cornish* (2006) p 94

<sup>26</sup> Payton, op. cit p 47

<sup>27</sup> Elliott-Binns, op. cit. p 157

Truro he directed his address to “the barons of Cornwall, and all men both English and Cornish”<sup>28</sup>. During the time of Reginald as Earl from 1140 to 1175 he appointed the Sheriff, the official responsible for royal administration in the shire, and “controlled Cornwall as a palatinate”<sup>29</sup>. Cornish accounts were not presented to the Exchequer at Westminster, royal officers were excluded from Cornwall and the earl possessed the right to pardon outlaws<sup>30</sup>.

In 1201 King John granted a Charter (See Appendix D) to the tinnerns of Cornwall, the Stannaries, which refers to and confirms their ancient customary right, liberties and privileges. It stated the only magistrate with jurisdiction over the tinnerns was to be their Warden and he alone may summon them for civil or criminal matters<sup>31</sup>. The Charter, confirmed by later Charters, emphasises the antiquity of a system which has left no written records. The tinnerns had their own Stannary courts which were responsible for all matters except land, life and limb, their own laws and their own taxation, called coinage; they acknowledged no lord, were subject to no manorial dues or constraints, and obeyed the king only when his orders were transmitted through their warden<sup>32</sup>. Cornish non-tinnerns were “strangers” or “foreigners” as far as the Stannaries were concerned. The Stannaries extended over the whole of Cornwall and afforded local people a “unique set of legal privileges”<sup>33</sup>. The Stannaries provided a rich source of income for the Earls and later the Dukes of Cornwall.

The Earldom passed into the hands of Henry Fitz-Count, son of Reginald who by a Charter of 1215 was granted “the County of Cornwall with its demesnes and appurtenances”<sup>34</sup>. A further Charter of 7th February 1217 in the reign of Henry III

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<sup>28</sup> Payton, op. cit p. 77

<sup>29</sup> Morris, W. A., *The Medieval English Sheriff to 1300* (1927) p 181

<sup>30</sup> Page, M., *Royal and comital government and the local community in thirteenth-century Cornwall* (1995) Thesis (D. Phil) Oxford University 1995 p.43

<sup>31</sup> Halliday, op. cit. p. 127

<sup>32</sup> Halliday, op. cit. p 127

<sup>33</sup> Lewis, G R., *The Stannaries: A Study of the Medieval Tin-Miners of Devon and Cornwall* (1965) especially pp 107-8

<sup>34</sup> Patent Roll 17 John Mem 15 1215

confirmed the previous Charter granting "...Henry Fitz-Count...the *Comitatus Cornubiae*..<sup>35</sup> „<sup>36</sup>.

The most significant and distinguished individual to hold the title of Earl of Cornwall was Richard who was born in 1209. He was the second son of King John, during whose reign Magna Carta was granted, and brother of Henry III. Richard was granted the Earldom in 1227<sup>37</sup>. He became King of the Romans in 1257. After his return from a Crusade he introduced fifteen byzants (gold Byzantium coins) to his coat of arms which became and remains part of the Cornish coat of arms. The Charter of 1231 (see Appendix C) by which the Earldom of Cornwall was granted to Richard gave him "...the whole county of Cornwall, with the Stannary and all mines and other appurtenances of the same county..." Richard like his predecessors had the right to appoint the Sheriff of Cornwall. Under King John the men of Cornwall had paid 500 marks for the privilege of electing their own sheriff. They claimed that Richard of Cornwall and his successor had deprived them of this liberty<sup>38</sup>. He had the profits of the county courts, feudal incidents such as wardship, a half share of the wrecks at sea and chattels of convicted felons. He also enjoyed the profits of the Stannaries<sup>39</sup>. Some of the power was lost after the demise of Richard, however, Cornwall continued to be administratively peculiar.

During the 13<sup>th</sup> Century the role of Sheriff, who occupied an important position in Medieval England, changed: he evolved from being a personal servant of the monarch into a holder of an office subject to fixed rules and forms<sup>40</sup>. He had a number of staff including an under-sheriff, a treasurer, beadles and bailiffs and clerks who were sent on his official errands and who are recorded as having power of arrest and as being in charge of the jail during the Sheriff's absence<sup>41</sup>.

The Sheriff was:

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<sup>35</sup> Latham, R.E., *Revised Medieval Latin Word List* (1965) p 98 *Comitatus Cornubiae* Earldom (County) of Cornwall or the territory of the Cornish or the Cornish people

<sup>36</sup> Patent Roll 1 Henry III Mem. 13 7<sup>th</sup> February 1217.

<sup>37</sup> Elliott-Binns, op. cit. p.159

<sup>38</sup> Denholm-Young, N., *Richard of Cornwall* (1947) p.164

<sup>39</sup> Deacon. op. cit. p 34

<sup>40</sup> Morris, op. cit. p 167

<sup>41</sup> Morris, op. cit. p 189

“the presiding official of the local courts. In the county courts he supervised the judicial system resting upon custom...he maintained order and enforced a local police system still of great importance at the beginning of the 13<sup>th</sup> century but broken down at the end.”<sup>42</sup>

“The jurisdiction of the county court extended to transgressions included in the Sheriff’s peace.....The king’s writ might even authorise the Sheriff to dispose of a criminal case by jury in full county courts.”<sup>43</sup>

“The Sheriff was also responsible for making public announcements of executive acts or orders, new laws or even judicial summonses.... Coroners took the oath of office before the Sheriff.”<sup>44</sup>

The Sheriff was responsible for many other important functions in fact he combined in one office judge, summoner, constable and executive official<sup>45</sup>. Arguably the most important role performed by the Sheriff was the fiscal function:

“Each year he was expected to appear before the Exchequer twice...to make proffer or advance payment upon the debts collected during the fiscal year and also to come on one or more occasions especially designated to close up his accounts for the preceding year.”<sup>46</sup>

The Sheriff was clearly an important local official and his appointment by the Earls of Cornwall together with the control of the Stannaries, including the appointment of the Lord Warden of the Stannaries, gave the Earl exclusive power within Cornwall.

To place the position of Cornwall in perspective it should be borne in mind, for example, the power of the Marcher Lords along the Welsh border and in much of South Wales was considerable. They exercised a high degree of legal and practical independence, with the monarch’s approval, until the sixteenth century<sup>47</sup>. The English nation was emerging and, it was not a homogeneous centralised state. The position of Cornwall and the powers

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<sup>42</sup> Morris, op. cit. p 192

<sup>43</sup> Morris, op. cit. p 196

<sup>44</sup> Morris, op. cit. p 199

<sup>45</sup> Morris, op. cit. p 204

<sup>46</sup> Morris, op. cit. p 242

<sup>47</sup> For a fuller discussion see Otway-Ruthven, A.J., “The Constitutional Position of the Great Lordships of South Wales” (1958) *Transactions of the Royal Historical Society* 5<sup>th</sup> series viii p 5

given to the Earls, including the power to appoint the Sheriff, were unusual but not unique.

This was also a time in English history when the origins of Parliament can be discerned. It came to be accepted that the king ruled through institutions with, to some degree anyway, the trust of the people<sup>48</sup>. It was a tumultuous period with a civil war being fought between 1259 and 1264. There was change to systems of administration, with Sheriffs, for example, being appointed for one year and being paid in order to discourage corruption. During this period Bracton could write “The king ought to be subject of God and the law for the law made him king”<sup>49</sup>.

Richard of Cornwall was succeeded by his son Edmund in 1272. It was Edmund, the last Earl to live in Cornwall, who decided Lostwithiel should be the capital of Cornwall. He built the, so called, “Duchy Palace” which included a Shire Hall, a Hall of Exchequer and a Coinage Hall where Tinnars had to bring the blocks of metal to be weighed, assayed and stamped. There was also a Stannary gaol, a place of gruesome reputation. It is said Edmund’s palace then “was to Cornwall what the Palace of Westminster was to London and the county as a whole, the seat of government.”<sup>50</sup>

To give some context to the importance of Edmund, when he inherited the Earldom in 1272, he acted as lieutenant for the King when the monarch was out of the country to whom he also provided loans.<sup>51</sup> In 1297 the whole of the output of the tin mines of Devon and Cornwall was placed at Edward I’s disposal. On his father’s death Edmund inherited five “great masses” of land. These included most of the county of Cornwall and manors in Devon, extensive Thames Valley estates, lands in East Anglia, properties in the Midlands and finally a northern estate. The centre of the whole administrative system was in Berkhamsted<sup>52</sup>. Edmund was granted the Sherifffdoms of both Cornwall and Rutland.

The Stannaries of Devon and Cornwall were controlled by the Earl and at every stage of the process from when tin was mined until the smelted tin was stamped and approved for

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<sup>48</sup> Lyon, op. cit. p 54

<sup>49</sup> Quoted in Blackstone, Sir William, *Commentaries on the Laws of England* (1765) p 227

<sup>50</sup> Halliday, op. cit. p 131

<sup>51</sup> Midgley, L. Margaret, *Ministers’ Accounts of the Earldom of Cornwall 1296- 1297* (1942) p ix

<sup>52</sup> *Ibid* p xviii

sale the keeper of the Stannary exacted his due. The sums collected fell into three distinct categories being certain fixed taxes, perquisites of Stannary courts and a custom called tribulage. The Stannaries represented a significant source of funds.

The Earldom of Cornwall had an intimate relationship with Cornwall but it represented one part of a much larger estate. It was certainly important but the Earl had concerns other than the administration of his properties within the County.

Since comparisons are often made between the circumstances of Cornwall and Wales in relation to the English state it is worthwhile to consider the situation in Wales at this time. During this period there was conflict between Wales and England which resulted in two campaigns, one in 1276-77 and another in 1282. The English were successful and as a result the Statute of Wales was passed in 1284 which imposed English administrative systems and criminal law on the Welsh while allowing Welsh customary law to continue in some spheres. Cornwall, like Wales, part of the Celtic fringe was different and the Earldom was an indicator of that difference but, it must be emphasised, the unified state that became England was still emerging<sup>53</sup>.

After the death of Edmund in 1300 the Earldom reverted to the Crown until it was granted by Edward II to his despised favourite Piers Gaveston in 1307. Like his predecessors, as Earl of Cornwall, Gaveston was "...granted the whole County of Cornwall..and also the office of Sheriff of the said county, the Stannary and all mines..." (See Appendix C) After Gaveston's execution in 1312 the title lapsed to the Crown. The Cornish lands were granted to Isabella, wife of Edward II in 1317, only to be removed from her in 1324. The disposition of the Earldom of Cornwall during this period is an indicator of the troubled reign of Edward II. Isabella, with her lover Mortimer, was eventually to lead a rebellion against her husband which resulted in the King losing his throne.

The Cornish lands were restored to Isabella in 1327 by her son then King Edward III. She was deprived of the estate yet again in 1330. John of Eltham, the second son of Edward II and brother of Edward III was created Earl of Cornwall in 1328. Three years later in 1331

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<sup>53</sup> A council of knights hearing a dispute regarding the Carminow coats of arms in the 14<sup>th</sup> Century apparently concluded Cornwall was a separate Country. See Mill, J., "Genocide and Ethnocide: The Suppression of the Cornish Language" Partridge, J., (Ed.) *Interfaces in Language* (2010) p 194

he was granted the Cornish lands traditionally associated with the title. John died in Perth in 1336 so the estates fell back to the Crown. John of Eltham was the last Earl of Cornwall.

Richard Pearse argued:

“Under the ancient earldom Cornwall had been to a considerable extent independent, enjoying privileges in the shape of a measure of autonomy and freedom from direct interference by the central government in many of its affairs.”<sup>54</sup>

Julian Cornwall observed Cornwall was a “Celtic survival not yet assimilated into the English nation”<sup>55</sup>. While accepting the comments of Pearse and Cornwall it should be emphasised once more a number of places could make the same claim. Reference has already been made to the Marcher Lords and Wales. In Appendix E the Palatine Counties are examined with a particular focus on the Earldom of Chester and Duchy of Lancaster.

In a dispute which arose in 1855 in connection with the ownership of the mineral rights associated with the foreshores of Cornwall, the Duchy of Cornwall claimed:

“That Cornwall, like Wales, was at the time of the Conquest, and was subsequently treated in many respects as distinct from England.

That it was held by the Earls of Cornwall with the rights and prerogatives of a County Palatine, as far regarded the Seignory or territorial dominion.”<sup>56</sup>

The Duchy said:

“It is clear that the Earls exercised the prerogative right of granting by charter as in the case of the Crown. It is moreover deserving of notice, that the charters granted by the Earls were recognised and treated by the Crown as Royal Charters.”<sup>57</sup>

As an example of this right the Earldom was given the ability to create boroughs. This normally required a granting of a charter by the lord of the manor which was then

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<sup>54</sup> Pearse, R., *The Land beside the Celtic Sea: Aspects of Cornwall's Past* (1983) p 51

<sup>55</sup> Cornwall, J., *Revolt of the Peasantry 1549* (1977) p 42

<sup>56</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall 1854-1856 - Arbitration by Sir John Patteson (1854-55) p 14

<sup>57</sup> *Ibid* p 4

confirmed by the King. In Cornwall very few towns received royal confirmation as the Earl's authority sufficed<sup>58</sup>. By 1337 there were thirty of these chartered boroughs.

Later, as part of the same dispute, the Duchy asserted as follows:

“That the property so granted and held by all these Earls under the description of the County of Cornwall was a great honor or land barony which comprised the Lordship of the county and gave its possessor, as against the Crown,

1<sup>st</sup> The Territorial ownership of the county;

2<sup>nd</sup> The revenue of the county generally.

And particularly:-

The issues of the Stannary – The coinage duty and the right to pre-emption of tin;

The amercements of the forest;<sup>59</sup>

The wastes and purprestures of the county;<sup>60</sup>

Wreck of the sea and prisage of wines;<sup>61</sup>

The profits arising from the fisheries and the drying of fish on the sea shore;

Anchorage, described as a customary payment or toll for boats coming to land or sullage<sup>62</sup>.

3<sup>rd</sup> And other important privileges, some of them being in the nature of prerogative rights

Such as:-

The right of appointing the Sheriff;

The right of making free Boroughs;

The right of granting freedom from toll throughout the County;

And the right of holding fairs, markets, etc.”<sup>63</sup>

It was claimed by the Duchy:

“It is scarcely possible to conceive, that in thus augmenting the Earldom into a Duchy, and conferring that Duchy upon so distinguished a personage as the heir

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<sup>58</sup> Halliday, op. cit. p 136

<sup>59</sup> A fine imposed for stealing wood from the King's Forest

<sup>60</sup> The wrongful encroachment on another's property

<sup>61</sup> The Earl was entitled to one or two tuns of wine depending on the size of the ship. A tun is an old English unit of wine cask volume and equalled about 256 gallons.

<sup>62</sup> Waste

<sup>63</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall op. cit p 36



apparent to the throne, the intention could have been to have invested its possessor with less extensive rights and privileges than had previously been annexed to the lower dignity and enjoyed by the Earls, who were persons of inferior rank.”<sup>64</sup>

The extent to which the Duchy inherited the property rights and privileges of the Earldom is an issue which will be considered further as this work proceeds.

### *D The Creation of the Duchy*

The journey of Edward III to the throne was fraught with problems. His father, Edward II, had been forced to abdicate after a parliament held at Westminster in 1327 arranged by Queen Isabella, wife of Edward II, and her lover Roger Mortimer<sup>65</sup>. The disposition and abdication of an anointed King was an extraordinary event and must have made a considerable impression on his son and successor who was only fourteen when he ascended the throne. It was during the reign of Edward III, for example, it is claimed the Crown began to come to terms with the dangers posed of “perpetual conflict and the positive advantages gained from consensus”<sup>66</sup>.

In 1330 he both assumed personal rule and became the father of a son, Prince Edward of Woodstock (The Black Prince). Edward III was to father twelve children of whom nine survived. From his birth the Black Prince was known as Earl of Chester, a Palatine County, and the traditional estate of the King’s eldest son since 1254, although he was not formally created earl until 1333<sup>67</sup>.

The country over which Edward III took control was beset with problems:

“The fiscal demands of government combined with the famines of the 1320s had left the economy weakened. The King’s laws were flouted by bands of thugs who set up local protection rackets and terrorized their neighbours with complete

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<sup>64</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall op. cit. p 7

<sup>65</sup> Ormrod W. M., *The Reign of Edward III* (2000) p 9

<sup>66</sup> *Ibid* p 11

<sup>67</sup> Barber, R., *Edward Prince of Wales and Aquitaine* (1978) p16

immunity. Edward had to establish respect for himself and some sense of order in the society over which he theoretically ruled.”<sup>68</sup>

In addition to his other difficulties when Edward III did assume power in 1330 his family was in complete disarray. His uncle and cousins had been involved in opposition to the regimes of Edward II and Mortimer. “The surviving royal earls can have had little confidence in a monarchy that had twice betrayed them and was now held by an untried youth”<sup>69</sup>. Edward was also faced with a situation “which would have unnerved the most experienced of leaders”<sup>70</sup>. There were two camps opposing royal power: those who stood up against Edward II and those who opposed Mortimer. It was a situation which had to be dealt with sensitively. The King needed the support of the nobility for his wider ambitions and needed to resolve the tensions of the past. Edward III in the long term achieved his ends by diverting the hostilities within his realm to common external enemies notably France and Scotland.

In 1337 Edward III was about to launch a war with France to establish full sovereignty over his continental Duchy of Aquitaine. It was the beginning of what became known as the “Hundred Years War”. For the adventure to succeed he needed the support of the nobility and wider political community. In February/March 1337 he secured the agreement of Parliament to the war<sup>71</sup> which culminated in Edward honouring, “somewhat recklessly”<sup>72</sup>, many nobles who were to be his companions in arms. Most significantly the Earldom of Cornwall, the richest Earldom available,<sup>73</sup> was raised to a Dukedom and the title was conferred on his eldest son Prince Edward, Earl of Chester probably on 3<sup>rd</sup> March 1337 although the Great Charter of the Duchy of Cornwall is dated 17<sup>th</sup> March 1337. It was considered important that a suitable style be provided for the King’s eldest son who was already an earl. A further earldom would not have served that purpose.

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<sup>68</sup> Ormrod, op. cit p 17

<sup>69</sup> Ormrod W.M., “Edward III and His Family” (1987) *The Journal of British Studies* 1987 Vol. 26 part 26 p 400

<sup>70</sup> Bothwell, J., “Edward III and the “New Nobility”: Largesse and the Limitation in Fourteenth-Century England” (1997) *The English Historical Review* Vol. 112 No 449 p 1111

<sup>71</sup> Tuck, A., *Crown and Nobility 1272 – 1461* (1985) p 118

<sup>72</sup> Ormrod, W.M., “Edward III and the Recovery of Royal Authority in England, 1340-1360” (Feb 1987) *The Journal of the Historical Association* Volume 72 Number 234 p6

<sup>73</sup> Mortimer, I., *The Perfect King – The Life of Edward III* (2008) p 137

The title Duke had not been formerly used in England. It had previously been associated with continental possessions; William the Conqueror was Duke of Normandy and in addition the titles Dukes of Anjou and Aquitaine had for some time been associated with the English throne. The Dukedom of Cornwall was the first English Dukedom and is, therefore, the oldest.

Edward's explanation for the bestowal of honours was:

“Among the marks of royalty we consider it to be the chief that, through a due distribution of positions, dignities and offices, it is buttressed by wise counsels and fortified by mighty powers. Yet because many hereditary ranks have come into the hands of the king, partly by hereditary descent to coheirs and coparceners<sup>74</sup> according to our laws and partly through failure of issue and other events, this realm has long suffered a serious decline in names, honours, and ranks of dignity.”<sup>75</sup>

Payton claims that the Charters which established the Duchy of Cornwall “defined in detail the constitutional status of the Duchy and set the powers and privileges of the Duke.”<sup>76</sup> Later he says:

“...it was significant that in the same year that Edward III had created his seven year old son Duke of Cornwall, he had also advanced his claim to the throne of France. Here then was a monarch anxious to consolidate, enhance and expand his territories, accommodating his Celtic peripheries at home while precipitating continental adventure abroad.”<sup>77</sup>

In support of Payton's view is the wording contained within the Patent Roll dated 16<sup>th</sup> March 1337 (see Appendix C) by which the Earl of Salisbury was created and which says as follows:

“We, at the request of the prelates and nobles, and also of the Commons of our kingdom assembled in our present Parliament convened at Westminster, *willing more securely to establish the Royal sceptre as well as by the addition of new*

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<sup>74</sup> One or more people sharing an inheritance

<sup>75</sup> Tuck, A., *Crown and Nobility 1272 – 1461* (1985) p 119

<sup>76</sup> Payton op. cit. p 79

<sup>77</sup> Payton, op. cit. p 86

*honors as by the restorations of old ones, (emphasis added).....have advanced our most dear first begotten Edward (whom in the prerogative of honour as is meet, we have caused to have precedence of others) to be Duke of Cornwall, over which awhile ago Dukes for a long time successively presided as chief rulers (emphasis added)."*<sup>78</sup>

This does seem to refer back to a period before the creation of the Earldom, indeed before the Conquest to a time when the rulers of Cornwall were called Kings, Earls and Dukes. Others take a different view suggesting the creation of the Duchy had: "finally neutered the potentially troublesome and independent earldom"<sup>79</sup>. Furthermore, the Duchy is a:

"..permanent reminder of Cornwall's former quasi-palatine status..(the earls had been granted) considerable leeway in order to maintain ultimate control over a vulnerable frontier.. the power of the independent earl became an anachronism and was whittled away. (it was) the attenuated rump of palatine status kept safely within the family."<sup>80</sup>

David Burnett would appear to support Deacon's view. He says:

"The Cornish hankering for independence had never died...The elevation from earldom to dukedom and the gift of it to his son, might appeal to Cornish pride and give the *illusion* (emphasis added) that they were being granted some semblance of autonomy from direct English rule."<sup>81</sup>

Edward of Woodstock was made Prince of Wales in 1343 a title his father never enjoyed<sup>82</sup>. It is commonly suggested Edward II was assassinated after his abdication. Ian Mortimer in his book the "The Perfect King" argues that in fact he went into exile having retained the title of Prince of Wales. Thus the title could only be conferred on the young

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<sup>78</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall op. cit. Appendix L

<sup>79</sup> Deacon, op. cit. p 36

<sup>80</sup> Deacon, op. cit. p 38

<sup>81</sup> Burnett, D., *A Royal Duchy* (1996) p 18

<sup>82</sup> A paper produced by the European Commission entitled "The Euromosaic Study – Cornish in the United Kingdom" dated 8<sup>th</sup> August 2011 says as follows "Eventually the area (Cornwall) was officially expropriated into England despite the fact that the Duchy of Cornwall pertained to the Prince of Wales, whom was, in any case, a member of the English Royalty".

[ec.europa.eu/languages/euromosaic/uk1\\_en.htm](http://ec.europa.eu/languages/euromosaic/uk1_en.htm)

prince when his grandfather died<sup>83</sup>. By 1362 “...the Black Prince had built up the most extensive collection of titles and territories held by a Plantagenet heir since the twelfth century”<sup>84</sup>. He was later to be created Prince of Aquitaine.

#### A recurring debate

It is convenient at this point to highlight a theme that will recur throughout this work. It is reflected in the comments of Payton, Deacon and Burnett which demonstrate the opposing arguments deployed by the Duchy, the Crown and others and are central to an understanding of the tension which exists between the Duchy and Crown.

The fundamental position adopted by the Crown, as will be shown later, was that the Duchy and the Duke had no more rights than those explicitly granted by the various Duchy Charters of 1337 and later. The Duchy argued that certain rights not specifically mentioned in the Duchy Charters were the Duchy’s by implication since the Duchy had inherited the rights of the Earldom. The claims of the Duchy were dismissed by the Crown as a “Reliance on antiquarian suggestions as to ancient status of Cornwall.”<sup>85</sup>

#### *E Conclusion*

The relationship between the developing English state and Crown and Cornwall is a matter of heated debate. While it is clear Cornwall was never “occupied” by the Anglo-Saxons it acknowledged their overlordship. Cornwall, it is suggested, was “semi-autonomous”, “neither wholly part or wholly separate” of what would later become England. The Normans, the argument continues, understood and sustained this particular connection as demonstrated by the creation of the Earldom which enjoyed wide control with the right, for example, to appoint the Sheriff, a position of substantial authority, the control the Stannaries including the appointment of the Lord Warden of the Stannaries, the Stannary Courts and system of taxation, the power to grant rights by charter. Indeed, it is maintained, the Earldom of Cornwall enjoyed “semi palatine” powers. The creation of the Duchy was occasioned by certain political imperatives and, in addition, further reinforced the continued accommodation between the English state and its Cornish

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<sup>83</sup> Mortimer, op. cit. p 137. See also Mortimer, I., *Medieval Intrigue* (2010) in which he explores the issue in great detail. See in particular pp 176 - 177

<sup>84</sup> Ormrod W.M., *Edward III and His Family* op. cit. p 414

<sup>85</sup> TNA LRRO 11/15 - Statements relating to the dispute between the Crown and the Duchy of Cornwall concerning the seaward extent of Cornwall (1865)

periphery. On this argument the Duchy inherited the rights and obligations of the previous Earldom. Mr Biscoe in an article which appeared in the *Western Morning News* claimed:

“..the Duke (was granted) sovereign powers inherited from the kings of Cornwall, carried on by Earls.”<sup>86</sup>

Others go even further and contend:

“..the creation of the Duchy of Cornwall..was intended to exploit the de facto independence of Cornwall beyond English law to permit the Duke to exercise absolute power...”<sup>87</sup>

By contrast opponents of the proposition set out above<sup>88</sup> suggest Cornwall became part of England from the mid 10<sup>th</sup> century. In particular John Chynoweth has argued against the developing theory of “Cornish distinctiveness”<sup>89</sup>. For these writers Cornwall was a county within England albeit with specific Cornish features. The creation of the Duchy was a gesture, no more, its control guaranteed by ensuring it was always kept within the family of the Sovereign. The Duchy was a new creation, whose powers when compared with that of the Earldom, had been considerably reduced.

It is unarguable that Cornwall had many distinct but not exclusive features which made it different. The degree to which those characteristics have been maintained, largely because of the intimate relationship between the Duchy of Cornwall and Cornwall, makes Cornwall the object of special interest. However, the claim that the creation of the Duchy of Cornwall was an acknowledgement of the semi-independence of Cornwall with the Duke being granted “sovereign powers” will be explored in more detail in later chapters.

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<sup>86</sup> Biscoe, Bert, “The Duchy is a sovereign land – not a private company” *Western Morning News* 5<sup>th</sup> November 2011

<sup>87</sup> [www.cornishstannaryparliament.co.uk](http://www.cornishstannaryparliament.co.uk)

<sup>88</sup> In addition to those already quoted in this chapter the talks given by Dr Oliver Padel in the Royal Institute of Cornwall on 13<sup>th</sup>, 20<sup>th</sup> and 27<sup>th</sup> November 2010 argues this position forcefully.

<sup>89</sup> Chynoweth, op. cit. pp 21 - 31

## Chapter 2

### The Creation of the Duchy of Cornwall

*“...the Duke was quasi sovereign within his Duchy...”<sup>1</sup>*

#### A Introduction

Unlike many English institutions whose origins are obscure, the beginning of the Duchy of Cornwall can be precisely traced. On the 16<sup>th</sup> March 1337 it did not exist; by the Charter of Creation of the Duchy of Cornwall dated 17<sup>th</sup> March 1337 it came into being. For reasons that will be explained it was decided this was an Act of Parliament and it appears on the Statute Law Database. The Charter of Creation was followed by further Charters dated 18<sup>th</sup> March 1337, 3<sup>rd</sup> January 1338 and 9<sup>th</sup> July 1343. These later Charters are not regarded as Statutes though this does not mean they have no legal significance. During this period Parliament did not sit regularly and the bulk of laws were made by Royal Charter. There have, of course, been other Charters, the Charter of 16<sup>th</sup> March 1337 has already been noted, but the four outlined and which appear in Appendix C are the most significant. They will be considered in turn.

#### B Charter of Creation 17<sup>th</sup> March 1337

This Charter which refers to the “common consent....of our Council in this Our present Parliament in Westminster...” created Edward, Earl of Chester, son of Edward III and heir to the throne as Duke of Cornwall. The Charter provides that the Dukes of Cornwall shall “constitute and appoint Sheriffs of (Cornwall) at their will and pleasure...without hindrance of Us (Edward III) or Our heirs forever...”. This privilege was not unusual: the Sheriff of Westmorland was a hereditary office, in Durham the Bishop appointed the Sheriff and the Sheriff of Lancashire was appointed after 1351 by the Chancellor of the Duchy of Lancaster. It is worth repeating what an important office this was. As late as 1704 it could be said “...he hath authority to raise the *posse comitatus*<sup>2</sup> to suppress riots

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<sup>1</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall 1854-1856 - Arbitration by Sir John Patteson - Preliminary Statement by the Duchy p 11

<sup>2</sup> The ability of the Sheriff to conscript able bodied men to assist him in keeping the peace within a county or earldom

and rebellions...(and) jurisdiction both in criminal and civil cases and for this purpose has two courts...”<sup>3</sup>

It is stated in the Charter:

“And that there may be no doubt hereafter, what, or how much the same duke, or other dukes of the same place for the time being, under the name of the said dukedom ought to have, *Our will is, that all in specialty which to the said dukedom doth belong be inserted in this Our charter.* (emphasis added)”<sup>4</sup>

An alternative translation of the Charter which appears in UK Statutes is as follows:

“..lest it may in anywise hereafter be doubted what or how much the same Duke or other Dukes of the same place for the time being in the name of the duchy aforesaid ought to *have all the things in particular which we will pertain to the same Duchy, we have commanded to be inserted in this our Charter.*”<sup>5</sup>

The Crown relies on this section to reinforce its argument that the rights of the Duchy are those set out in the Charter or Charters<sup>6</sup>. The Crown argues the Earldom of Cornwall reverted to the King and no longer existed. The Dukedom was a new creation whose basis is the Charters which set out the rights and properties to which the Duchy is entitled and the conditions under which they are held.

A number of castles, boroughs, manors and honours which were to be the property of the Duchy are listed in the Charter. The Duke of Cornwall shall enjoy:

“Our prizage<sup>7</sup> of wines..all the profits of Our ports...wreck of sea...whales, sturgeons and other fishes which do belong to Us (Edward III) by reason of our prerogative...profits and emoluments of our County Courts..and the hundred of Courts..and also our Stannary..together with the coinage of the said Stannary and all issues and profits thereof arising and also the explees and profits and

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<sup>3</sup> *Sheriff* (1704) (3 Salkeld 322) (91 E.R. 849)

<sup>4</sup> Manning, J., *Report of cases argued and determined in the Court of Kings Bench during Michaelmas Term Ninth Geo IV* (1830) p 474-482

<sup>5</sup> Statute Law Database

<sup>6</sup> See for example TNA LRRO 11/15 – Statements relating to the dispute between the Crown and the Duchy of Cornwall concerning the seaward extent of Cornwall (1865) and page 110 of this thesis.

<sup>7</sup> The prizage of wine meant the Duke was entitled to one tun of wine from ships of less than 20 tons and two tuns of wine from larger ships



perquisites of the Court of Stannary and mines in the said county (of Cornwall)..."

The Charter continues that "...our Stannary of Devon.. and the water of Dartmouth..prizage and customs of wine in the water of Sutton in the County of Devon..." shall also be granted to the Duke.

Various properties and privileges, the Charter says, shall be held:

"..to the said Duke and to the first begotten sons of him and his Kings of England being dukes of the said place and heir apparent to the said kingdom of England.."

Thus it is provided the heir to the throne being the eldest son of the sovereign shall be Duke of Cornwall.

A list of various manors is set out which are to be annexed and united:

"..to the same *forever to remain*, so that from the said duchy at no time they be any ways severed nor to any persons other than the dukes of the same place.." (emphasis added)

The various properties are, it should be emphasised, to be "annexed and united to the same (the Duchy), to forever to remain.."

Expressed another way by the Charter:

"...the property of the Duchy is in every respect inalienable: the King has no power to alter the disposition of it – the Prince of Wales has no power to alter, in the slightest degree the disposition of it."<sup>8</sup>

Later it is set out:

"...that whenever the abovesaid duke or other dukes of the same place shall depart this life, and a son or sons not then appear, the said duchy....shall revert, to be retained in Our hands and in the hands of our heirs, kings of England, until such son or sons, being heir or heir apparent to the said kingdom of England, shall appear..."

The Duchy shall "revert" to the Crown when there is no Duke of Cornwall. This provision has created more confusion than any other.

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<sup>8</sup> Concanen, G., *A Report of a Trial at Bar Rowe v Brenton* (1830) p xx

The Ministry of Justice wrote to the writer on 9<sup>th</sup> March 2009:

“The charter which created the Duchy sets out the property and income attached to the Duchy at its creation, and the manner of its reversion and inheritance. It is of limited relevance today, but has not been entirely replaced by subsequent Acts.”<sup>9</sup>

The statement is inaccurate. The Charter of Creation is still fundamental to the present position of the Duchy and its relevance is more than “limited”. Indeed the precise meaning of the Charter has been discussed in two recent cases<sup>10</sup>.

### *C Charter 18<sup>th</sup> March 1337*

This confirms that the Charter of the previous day was made with the consent of the Parliament in Westminster and provides that in order that the Duke of Cornwall might be maintained “in a manner becoming (the) nobility of his race and to support his charges..” that various rights privileges and properties be granted. These were to include shrievalty of Cornwall, prize of wine, profits of ports<sup>11</sup>, wreck of sea, profits of Courts, the Stannaries with the benefits arising therefrom and so on as set out in the previous Charter.

In addition this Charter, in order to do more “ample favour to the said Duke”, granted for:

“Us and Our heirs, that the said duke, and the first begotten sons of him and his heirs kings of England being dukes of the same place, and heirs apparent to the said kingdom of England, do for ever have the return of all writs of Us and Our heirs, and of summonses of the Exchequer of Us and Our heirs, and attachments, as well in pleas of the crown as in all others, in all his said lands and tenements in the said county of Cornwall, so that no sheriff or other bailiff or minister of Us or Our heirs enter those lands, or tenements, or fees to execute the said writs and summonses, or attachments, as well in pleas of the crown as in the others aforesaid, or do any other official act (*officium*) there, except in default of the said duke and other dukes of the said place, and his and their bailiffs or ministers in his and their lands, tenements, and fees aforesaid....”;

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<sup>9</sup> Letter Ministry of Justice to writer 9 March 2009

<sup>10</sup> *Michael Bruton v The Information Commissioner and the Duchy of Cornwall* (2011) EA/2010/0182 and *John Kirkhope v Information Commissioner and The National Archive* (2012) EA/2011/0185

<sup>11</sup> The profits of port included “Coket” (a custom levied on wools, woolfells and hides) and “Maltot” (a custom levied on alien merchants).

The particular point to note in this Charter is that although the Duke enjoyed “return of writs”<sup>12</sup> the writs were issued in the King’s name not that of the Duke. Writs issued in the Palatine County of Chester and the Duchy of Lancaster were issued in the name of the Earl or Duke respectively.

### *D Charter 3<sup>rd</sup> January 1338*

The two previous Charters are reiterated and confirmed. It sets out, once more, the desire that the Duke “might be able to maintain in a manner becoming the nobility of his race..”. It repeats the Duke appoints the Sheriff of Cornwall and that the Duchy has all return of writs within Cornwall together with:

“summonses of Exchequer..attachments, as well in pleas of the Crown as in all others..So that no Sheriff, or other bailiff or minister of Us or Our heirs enter those fees to execute the said writs and summonses or to make attachments, as well as pleas of the Crown as in the others aforesaid, or do any official act there except in default of the said Duke and other Dukes of the said place...”

Writs are issued in the name of the King but they may not be served by any officer of the Crown without the approval of the Duke.

For “Kernowcentrics” this third Charter has particular significance since it granted “the Duke sovereign powers”<sup>13</sup> and “purported to grant the Duke the absolute government of Cornwall.”<sup>14</sup>

### *E Charter 9<sup>th</sup> July 1343*

The creation of the Duchy re-establishes that which had been wrought apart. It says:

“...considering, therefore, how the Earldom of Cornwall, now called the Duchy of Cornwall, hath sustained for a length of time a great dismemberment of its rights,

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<sup>12</sup> The right to execute royal writs within a particular area which was usually the obligation of the king’s representative. For further see Clanchy, M.T., *The Franchise of Return of Writs* (1967) Transactions of the Royal Historical Society Fifth Series pp 59-82. He explains at page 62 the first references emanates from the Norfolk-Suffolk shrievalty dated 1199 and was not common until 1250. No sheriff or bailiff may execute writs with lands “except through returns of the same writs made to the franchise holder. The charters granting return of writs was intended “to curtail a liberty-holder’s privileges not to increase them” Clanchy p 66.

<sup>13</sup> Biscoe, Bert, “The Duchy is a sovereign land – not a private company” *Western Morning News* 5<sup>th</sup> November 2011

<sup>14</sup> [www.cornishstannaryparliament.co.uk](http://www.cornishstannaryparliament.co.uk)

and desiring to make integral (*redintegrare*<sup>15</sup>) the said Duchy and re-collect its rights thus dispersed, in consideration of the premises we have given and granted for us and our heirs to the aforesaid Duke..”

This is the Charter upon which the Duchy relies to argue it has, by implication, inherited the rights and privileges of the Earldom. It is inconsistent with the first Charter of 17<sup>th</sup> March 1337.

The Charter grants to the Duchy further manors which had lately come into the King’s hands following the deaths of various persons. It concludes by saying:

“Wherefore we will and firmly command for us and our heirs, that the aforesaid Duke should have and hold the manors, towns, hamlets and tenements aforesaid, to the aforesaid Duke and his said heirs forever as annexed and united to the aforesaid Duchy, together with the fees, advowsons<sup>16</sup>, and their appurtenances<sup>17</sup> aforesaid of us and our heirs as is aforesaid.”

#### *F The Charters – A “re-collection of dismembered rights”*

The foundations upon which the Duchy was erected and continues to operate are the Charters. They are not simply interesting historical documents. The Charter of Creation is an Act of Parliament and provides the legal basis for the Duchy. The other Charters continue to represent the core documents upon which the Duchy, even today, bases claims to certain rights. It will become clear that the precise meaning of the Charters is not agreed and has been the subject of significant disputes between the Crown and the Duchy.

Rowse said the Charters referred:

“*indirectly* (emphasis added) to the Norman earldom of Cornwall and perhaps further than that to the conquests of the House of Wessex upon Cornish soil..”<sup>18</sup>

To contradict the claim of Dr Rowse the Charter of 1343 makes specific, not indirect, reference to “..the Earldom of Cornwall, now the Duchy of Cornwall..”

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<sup>15</sup> restore

<sup>16</sup> Right of presentation to a Church benefice

<sup>17</sup> Something added to another

<sup>18</sup> Rowse, A. L., *West Country Stories* (1945) p 95

The “dismembered” rights are more than property rights, although clearly substantial estates were granted to the Duchy, not only the possessions previously part of the Earldom of Cornwall but additional land and manors as well. The Duchy claims it inherited from the Earldom not just rights to property but prerogative or sovereign rights. The Charters are contradictory. The Great Charter of Creation stating: “..Our will, is that all in speciality (every particular) which to the said Dukedom doth belong be inserted in this Our Charter”. While the Charter of 9<sup>th</sup> July 1343 refers to the Earldom of Cornwall “the great dismemberment of its rights” and the need to re-collect the rights “thus dispersed”.

The Crown has insisted the Charters granted territorial not sovereign rights and is adamant that the Duchy is not entitled to import the rights previously enjoyed by the Earldom.

*G The Duke to be “maintained in a manner becoming the nobility of his race”*

An important objective of the Charters was to provide the heir to the throne, being the eldest son of the monarch, with a source of income enabling him to maintain his status. To that end the Charters list many manors, castles and boroughs granted to the Duchy. They are described as the seventeen “*Antiqua Maneria*”<sup>19</sup> inherited by the Duchy from the Earldom and are:

“Rillaton, Stoke Climsland, Helston-in-Trigg, Liskerad, Trybesta, Tywarnhaile, Talskey, Penmayne, Calstock, Trematon Castle and Manor, Restormel Castle and Manor, Penketh, Penlyne, Tewington, Helston-in-Kerrier, Tintagel and Moresk”

In addition there are the “*Forinseca Maneria*”<sup>20</sup> annexed to the Duchy by the Charter of Creation which included: (*Forinsca* because they were outside Cornwall.)

“the fee-farm of the City of Exeter, the Monaor of Lydford with the “chace (forest) of Dartmoor”, the Monaor and Borough of Bradninch, the Water and River of Dartmouth, the Castle Manor and Town of Berkhamsted, the Manors of Byfleet, Meere, Knaresborough, Castle Rising, Cheylesmore, the City of

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<sup>19</sup> Ancient Manors

<sup>20</sup> Foreign (external to a district or community) Manors

Coventry and the Manor of Kennington, the Honors of Wallingford and St Valery, and the Manor of Isleworth”<sup>21</sup>.

For the sake of completeness various manors were exchanged for the Manor of Isleworth in 1421 by Henry V. In addition Henry VIII, following the attainder and execution of the Marquis of Exeter in 1539, exchanged Duchy manors for the Honors of Wallingford and St Valery. Other manors were obtained by the dissolution of the Priors of Launceston and Tywardreth.

Note that the Charter of Creation states explicitly the various manors are: “...to be annexed and united..(to the Duchy)..*forever*..so that from the said duchy at no time they be any ways severed..”. A condition which was often more honoured in the breach than in the observance.

In addition to the various manors, castles and so on, the Duchy was granted prerogative rights which in the 14<sup>th</sup> Century were significant sources of revenue. These rights included::

The right to wreck, today likely to be a source of cost rather than benefit, but subject to dispute well into the 19<sup>th</sup> Century<sup>22</sup>;

The right to Royal Fish, which included whales, porpoise, grampuses and sturgeon, once highly prized;

Prisage and customs of wine. This comprised one tun of wine from ships of less than 20 tuns and 2 tuns of wine from every ship which landed of more than 20 tuns of wine in Cornish Ports and the waters of Sutton and Dartmouth<sup>23</sup>;

The profits of Cornish ports including those arising from the fisheries and the drying of fish on the sea shore;

The seizure and confiscation of enemy ships in times of war and the enemies merchandise contained in them<sup>24</sup>;

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<sup>21</sup> Coates, Mary, “The Duchy of Cornwall: Its History and Administration 1640 to 1660” (1927) *Transactions of the Royal Historical Society*, p 146-147

<sup>22</sup> TNA BT 243/262 - The Duchy of Cornwall: Legislation relating to right of wrecks of the sea (1856 – 1985)

<sup>23</sup> Mildren, J., “Cornwall” in Gill, C., (Ed.) *The Duchy of Cornwall* (1987) p 86

<sup>24</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall 1854-1856 - Arbitration by Sir John Patteson (1854 -1855) Duchy Preliminary Statement p 6

The right to *bona vacantia* and *escheat*<sup>25</sup>. These are two aspects of, usually, the vesting in the Crown of property which has no owner. Described rather more graphically as:

“The reversion under feudal law of a fief to the lord, on the extinction or corruption of the blood of the tenant; thus an estate might be escheated either by lack of heirs or by forfeiture for treason.”<sup>26</sup>;

The amercements of the forest<sup>27</sup>;

The Stannaries and the Coinage for the whole of Cornwall and the right of pre-emption which related thereto together with the Stannaries of Devon; and

The profits of our County Courts and hundred of Courts.

In addition the Duke had other feudal dues which today seem odd. The owner of one Cornish manor was obliged to part with one greyhound a year. He quickly got in arrears. A cottager near Constantine baked a lamprey pie with raisins in lieu of rent. As late as 1973 Prince Charles received his feudal dues being a hundred silver shillings and a pound of peppercorn from the Mayor of Launceston; a salmon spear and a load of firewood, to be brought daily while the Duke was in residence, from Stoke Climsland; a bow of alder from Truro; a pair of white gloves from Trevelga and a pair of greyhounds from the manor of Elerky in Veryan<sup>28</sup>. The Duke was required to acknowledge the dues. Each donor was presented with a white rod accompanied by the statement “I confirm you, and those you represent, tenants, and give you and them peaceable and quiet siezen<sup>29</sup> and possession of the manors, lands and tenements which you hold or represent according to custom”<sup>30</sup>.

*H* “...the Duke was quasi-sovereign within his Duchy”

The Charters granted more than “income producing” assets to generate sufficient resources for the male heir to the throne being the son of the sovereign to sustain himself

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<sup>25</sup> There is some doubt whether these rights originally applied to the whole of Cornwall or simply in respect of the accessionable manors granted to the Duchy within Cornwall.

<sup>26</sup> Alexander, J.J., “Escheators of Devon 1300-1450” (1934-35) *Devon and Cornwall Notes and Queries* p 164 (The author went on to explain “The process often associated in the popular mind with rapacity and injustice has given a sinister meaning to the modern version of the word, viz “cheat”).

<sup>27</sup> Then fining of people who trespassed in the King’s forest, or in this case the Duke’s forest

<sup>28</sup> Burnett, D., *A Royal Duchy* (1996) page 21

<sup>29</sup> Possession, ownership, possession of an estate in freehold (Webster’s Online Dictionary)

<sup>30</sup> Mildren, op. cit. p 90

in an appropriate way. It was argued by the Duchy in the nineteenth century that “(the Duchy was a) fitting maintenance for all time of Heir Apparent... *and as a means of training and qualification for the future government of the Kingdom.*”<sup>31</sup>. During the same period the Duchy also claimed the Charters represented a “great constitutional settlement”. A contention with which the Treasury agreed<sup>32</sup>. This contrasts with the assertion today that the Duchy is a “private estate”<sup>33</sup>.

The Duke was granted additional high prerogative rights, the full extent of which has never been agreed, but which included the privilege of appointing the High Sheriff for Cornwall, a right which still exists today. This appointment was more than honorific: it was, as already has been explained, a function which once brought with it great power.

The granting to the Duchy of the Stannaries meant more than the Duchy enjoying the income therefrom. The Duchy became responsible for the Stannary Court System and later the Stannary Parliaments of Devon and Cornwall. The Lord Warden of the Stannary, an office which still exists, and the Vice Warden, who had overall responsibility for the Stannaries, were appointed by the Duke.

The various rights granted to the Duke in relation to the Ports involved the Duchy in appointing the Havenor which meant the Duke controlled the local Maritime Courts. The Duke also appointed the “feodary” an important official of the Court of Wards. It is arguable the Duchy had the right under the Charters to choose the Coroner for Cornwall but this does not seem to be a privilege the Duchy ever exercised<sup>34</sup>.

Additional high prerogative rights “..at least as extensive as those previously enjoyed and exercised by the Earls..”<sup>35</sup> were claimed by the Duchy, though not without challenge by the Crown, who complained about the Duchy’s reliance on “antiquarian suggestions”<sup>36</sup>. They included the following:

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<sup>31</sup> TNA CRES 58/741 – Seaward limited between Crown and Duchy of Cornwall (1865 – 1870)

<sup>32</sup> TNA T 1/14831 - Duchy of Cornwall title to gold and silver mines (1883)

<sup>33</sup> See Duchy of Cornwall Accounts 2012.

<sup>34</sup> *Jewison v Dyson* (1842) (9 Meeson and Welsby 540) p 588

<sup>35</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall op. cit. p 7

<sup>36</sup> TNA LRRO 11/15 – Statements relating to the dispute between the Crown and the Duchy of Cornwall concerning seaward extent of Cornwall (1865)



“The prerogative right of granting by Charter by virtue of the Earls, and now the Duke, being Lord of the County of Cornwall.”<sup>37</sup>.

The second Charter of 18<sup>th</sup> March 1337 granted the Duchy:

“return of writs of Us and Our heirs, in all his said lands and tenements in the said county of Cornwall, so that no sheriff or other bailiff or minister of Us or Our heirs enter these lands, or, tenements, or fees to execute the said writs and summonses...or do any other official act there ..”

The Government Law Officers as late as 1864, in connection with a dispute which arose over Treasure Trove, could say:

“It seems to us to be a legitimate inference from the general tenor of the Charters and especially from the Clauses which exclude all ministers of the Crown from entering any lands of the Duchy to make execution of any Writs that the Duke and not the Crown is entitled to Treasure Trove.”<sup>38</sup>

Under the Duke of Cornwall’s authority, prisoners charged with high felonies such as manslaughter were admitted to bail.<sup>39</sup> The inhabitants of the Islands of Guernsey, Jersey, Alderney and Sark paid alien tax to the Duchy even though they were exempted by the King in England<sup>40</sup>.

*I “...Duchy is Seignorial Lord of the entire County...”<sup>41</sup>*

It is now accepted that by the Charters the Duchy became entitled to the whole County of Cornwall. Indeed the Duchy in 1855 could claim the Duchy Charters “vested in the Dukes of Cornwall the whole territorial interest and dominion of the Crown in and over the entire County of Cornwall”<sup>42</sup>. In 1422 Henry V’s Parliament affirmed that “...the County of Cornwall should always remain as a Duchy to the eldest sons of the Kings of England...”. Whenever the Courts have been asked to consider the matter their pronouncements have been unambiguous. For example in *Chasyn v Lord Stourton* (1553)

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<sup>37</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall op. cit. Preliminary Statement p 4

<sup>38</sup> TNA TS 25/1330 - Treasure Trove at Luxulian Claim by Duchy of Cornwall (1864)

<sup>39</sup> Acts of the Princes Council 1352 Cap 2

<sup>40</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall op. cit. Preliminary Statement p 7

<sup>41</sup> Report to H.M. The Queen from the Council H.R.H. Prince of Wales (1862) p14

<sup>42</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall op. cit. Preliminary Statement p 14

it was said: “..this County of Cornwall should always remain as a Duchy to the eldest sons of the Kings of England who should be next heirs to the realm without being otherwise disposed of..”<sup>43</sup> Later in the *Princes Case* (1606) Lord Coke asserted “The County of Cornwall should always remain as a Duchy”.<sup>44</sup> More recently in *Canning v Canning* (1880) it was stated:

“The Prince is on the same footing in respect of the Duchy of Cornwall as the Crown is in respect of the rest of the kingdom. The Charters of the Duchy have always been treated both by the Courts of Judicature and the Legislature as having vested in the Dukes of Cornwall the whole interest and dominion of the Crown in and over the whole County of Cornwall.”<sup>45</sup>

In Cornwall, since the whole County is owned in fee from the Crown, the owner of an estate in Cornwall holds that property from the Duchy, and not directly from the Crown. Thus in Cornwall if *bona vacantia* or *escheat* arises then the property passes to the Duchy<sup>46</sup>. There is disagreement about the precise nature of relationship of the Duchy of Cornwall to the land of Cornwall which will be examined in detail in a later Chapter.

As late as 1864 the Crown denied that the Charters had granted the territory of Cornwall in “fee simple” to the Duchy despite the various judicial and other pronouncements. It referred to the Great Charter which, as we have seen stated:

“..Our will is, that all in specialty which to the said dukedom doth belong be inserted in this Our charter.”

It pointed out the Charters do not grant the territory of Cornwall to the Duchy and if that had been the King’s intention then that is what he would have said.<sup>47</sup> It insisted that one could not imply that the rights of the Earls had been imported into the Duchy and stated clearly the Charters carried no “sovereign or territorial rights”<sup>48</sup>. The matter has now been put beyond doubt by Statute.

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<sup>43</sup> *Chasyn v Lord Stourton* (1553) (1 Dyer 94a) p 205

<sup>44</sup> *The Prince’s Case* (1606) (8 Coke Reports 1a) p 496

<sup>45</sup> *The Solicitor to the Duchy of Cornwall v Canning* (1880) (5 P.D. 114 Probate)

<sup>46</sup> Funds received by the Duchy as a result of *bona vacantia* or *escheat* are usually paid the Duke of Cornwall’s Benevolent Fund which is a registered charity established in 1975

<sup>47</sup> TNA LRRO 11/15 op. cit.

<sup>48</sup> TNA LRRO 11/15 op. cit.

## *J Conclusion*

The grants to the Duchy set out in the Charters are so extensive the Duchy could submit in connection with the arbitration with regard to the ownership of the Foreshore of Cornwall as follows:

“..the Duke was *quasi* sovereign within the Duchy...”;

“..the Crown appears to have denuded itself of every remnant of seignory and territorial dominion which it could otherwise have enjoyed within the County or Duchy of Cornwall..”;

“It is submitted that the three Duchy Charters are sufficient in themselves to vest in the Dukes of Cornwall not only the government of Cornwall but the entire territorial dominion in and over the county which had previously been vested in the Crown and with all royal prerogatives which would naturally accompany..”;

“..by virtue of the three recited charters, the Duke did become entitled to the whole County of Cornwall..”; and

“That the Duchy Charters have always been construed and treated not merely by the Courts of Judicature, but also by the Legislature of the Country, as having vested in the Dukes of Cornwall the whole territorial interest and dominion of the Crown in and over the entire County of Cornwall.”<sup>49</sup>

The claims made were in connection with a dispute between the Crown and the Duchy and, therefore the Duchy made the best case it could. However, it is also apparent the overall arguments presented by the Duchy were accepted by the arbitrator, Sir John Patteson, and his decision was in turn translated into legislation<sup>50</sup>. There are those who claim the Duke of Cornwall remains *quasi* sovereign of Cornwall and that the government of Cornwall is vested in the Duchy but it is an obligation the Duke and Duchy chooses to ignore<sup>51</sup>. The Duchy and government describe the Duchy as a “private estate”<sup>52</sup> which, by implication, has no significant obligations, toward Cornwall. The process by which the Duchy has evolved from being *quasi sovereign* into a “private

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<sup>49</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall op. cit. Preliminary Statement p 14

<sup>50</sup> Cornwall Submarine Mines Act 1858

<sup>51</sup> See Biscoe, Bert, “The Duchy is a sovereign land – not a private company” *Western Morning News* 5<sup>th</sup> November 2011 and Angarrack, J., [www.duchyofcornwall.eu/duchy05.php](http://www.duchyofcornwall.eu/duchy05.php)

<sup>52</sup> Duchy of Cornwall Annual Accounts 2011

estate” and whether or not the Duchy has any remaining constitutional obligations to Cornwall will be the focus of much of that which follows in succeeding chapters.

*K* “*This strange species of inheritance..*”<sup>53</sup>

Lord Coke, the famous 17<sup>th</sup> century English jurist, described the Duchy as “A mode of descent unknown to common law”<sup>54</sup>. It has been characterised as “that strange sort of devolution”<sup>55</sup>. To understand the unique characteristic of the Duchy of Cornwall it is necessary to come to terms with the mode of descent which was created by the Charter of Creation of 17<sup>th</sup> March 1337. It provided, amongst other things, that the eldest son of the monarch being heir apparent succeeds to the title Duke of Cornwall immediately he is born by right of inheritance.<sup>56</sup> Sir John Dodridge in 1714 explained:

‘That the said son and Heir Apparent without further Solemnity of Creation should presently upon his birth being Heir apparent to the King, or from the time he is Heir apparent to the Kingdom be also Duke of Cornwall.’<sup>57</sup>

Another writer described the situation thus: “The Duke of Cornwall takes an estate in fee simple by descent immediately on his birth.”<sup>58</sup>

Only the Charter of Creation is regarded as an Act of Parliament since Lord Coke decided in the Prince’s Case in 1606<sup>59</sup> the Monarch could not, by prerogative power, create such a mode of descent and thus must have had Parliamentary authority. Watkins in 1795 said “It is peculiar and could only have been effected by Parliament.”<sup>60</sup> Joseph Chitty stated:

“This grant has been held to be an Act of Parliament, and is consequently good, though it alter the established course of descent which the King’s charter cannot do.”<sup>61</sup>

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<sup>53</sup> Blackstone, Sir William, *Commentaries on the laws of England Volume* (1832) p 169

<sup>54</sup> *The Princes Case* (1606) (8 Coke Rep 1a) p 500 (See also *Devon Peerage Case* (1831) (2 Dowl & Cl 200) and *Wiltes Peerage Claim* (1869) (LR 4 HL 126))

<sup>55</sup> Concanen, G., *A Report of a Trial at Bar Rowe v Brenton* (1830) p 63

<sup>56</sup> Halsbury’s *Laws of England* vol.12(1) paras. 318-353

<sup>57</sup> Dodridge, Sir John, *An Historical Account of the Ancient and Modern State of the Principality of Wales, Dutchy of Cornwall and Earldom of Chester* (1714) page 79

<sup>58</sup> Watkins, Charles, *An inquiry into the title and powers of His Majesty as guardian of the Duchy of Cornwall during the late minority of the Duke* (1795) p 11

<sup>59</sup> *The Princes Case* (1606) (8 Coke Rep 1a) (77 E.R. 481).

<sup>60</sup> Watkins, op. cit. p 14

<sup>61</sup> Chitty, Joseph, *A Treatise on the Law of the Prerogatives of the Crown* (1820) 403

Sir William Blackstone asserted the mode of inheritance of the Duchy “perhaps is the only mode of descent which depends upon the authority of statute.”<sup>62</sup> Professor John Hatcher opined that Edward III had ‘contrived to create...an unchanging, indeed virtually unchangeable institution, the tenure of which should never be disputed.’<sup>63</sup> Others have described the Duchy of Cornwall as “extraordinary”<sup>64</sup> and “that unbreakable entity”<sup>65</sup>.

We shall probably never know for certain why such a “strange mode of devolution” was created but some background will give a greater understanding. The First Chapter of The Statute of Westminster 1285 recognised *De dono conditionalibus*<sup>66</sup> which was a procedure which had become common practice. This meant that grants could be made specifically to the “heirs of the body” with reversion to the Crown (a fee entail). So that if the person to whom the grant was made had children or grandchildren the property subject to the grant could be passed to them but it could not be passed to brothers, sisters or other relatives. The grant to John of Eltham, the last Earl of Cornwall, was a “fee entail” and since John left no descendants the Earldom reverted to the Crown.

The fee male entail was a variant on the fee entail and meant property could only pass to the “male issue”. A grant on these terms was given to Richard, Earl of Cornwall in 1253, for example. The fee male entail became the established means of passing estates and titles of higher nobility. It is clear male entailments were regarded as very important for the aristocracy which, of course, included the Crown. So the fact the Charter creating the Duchy of Cornwall provided for a male entailment, albeit a particular form, or the reversion to the Crown was not unusual. What does distinguish the Duchy is the fact the reversion is not absolute but it is in turn conditional. For example, when John of Eltham died Edward III was free to grant the Earldom to another of his brothers or to retain it. On those occasions when the Duchy reverts to the Crown it is only for so long as there is no Duke. A grant which imposes a condition on both potential recipients is unique. It is possible in an uncertain world Edward III was trying to create a means to avoid

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<sup>62</sup> Blackstone, op. cit. p 169

<sup>63</sup> Hatcher J., *Rural Economy and Society in the Duchy of Cornwall 1300-1500* (1970) page 5.

<sup>64</sup> Watkins, op. cit. p 11

<sup>65</sup> Sharp, Margaret, “The Central Administrative System of Edward The Black Prince” in Tout, T.F., *Chapters on the Administrative History of Medieval England Volume V*; (1930) p 291

<sup>66</sup> Conditional Gifts

ambiguity. That is the Duke of Cornwall is, beyond doubt heir to the throne. If that was the case given what happened to his grandson Richard II he was only partially successful. It is probably the case that the Charter intended the first born son of the monarch be ennobled as a Duke. However, despite the Charter, the son of Edward, the Black Prince, Richard, later Richard II, who became heir to the throne on his father's death, was created Duke of Cornwall by Edward III: that is he did not inherit the title and never came into livery, thus he did not enjoy the right to the income from the lands or administer the Duchy. Henry of York, later Henry VIII, was made Duke of Cornwall, after the death of his elder brother Arthur, by Henry VII although he did not enjoy livery either. Charles, later Charles I, was also made Duke of Cornwall by his father James I after the death of his elder brother Henry<sup>67</sup>. The future George V became Duke of Cornwall on his father becoming Edward VII in 1901 despite the fact he had an elder brother Prince Albert Victor who had died in 1901. It is now generally agreed that the title Duke of Cornwall passes to the eldest *living* son of the monarch being heir apparent rather than the first born son<sup>68</sup>.

When there is no male heir apparent the title falls back into the Crown but is never extinguished or "absorbed" into the Crown. To quote A. L. Rowse: 'There may not be a Duke there is always a Duchy.'<sup>69</sup> When there is no Duke the Duchy is managed by the Crown and the Monarch 'acts as though Duke.'<sup>70</sup> During the minority of the Duke the Sovereign acts either as "guardian by prerogative" which position "does not appear to have been satisfactorily stated"<sup>71</sup> or as attorney for the Duke.

An example will illustrate this odd form of inheritance. Edward, later Edward VIII, was Duke of Cornwall until he became King in 1936. Upon his abdication, George VI became King. Since his daughter, and heir presumptive, Elizabeth, is female she did not become Duke of Cornwall on her father's accession. Thus from 1936 until the death of George VI in 1952, there was no Duke of Cornwall. When Elizabeth became Monarch her son Charles immediately became Duke of Cornwall, being heir apparent to the English throne (and Duke of Rothesay as heir apparent to the Crown of Scotland). The titles of Prince of

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<sup>67</sup> *Duchy of Cornwall Case* (1613) (1 Ves Sen 292)

<sup>68</sup> *Lomax v Holmden* (1749) (1 Vesey Senior 290) p 294

<sup>69</sup> Rowse, op. cit. p.3.

<sup>70</sup> Coates, op. cit. p 137.

<sup>71</sup> Watkins, op. cit. p 15

Wales and Earl of Chester are not inheritable<sup>72</sup>. Edward III was never Prince of Wales for example, while Queen Mary and Queen Elizabeth I were made Princesses of Wales by Henry VIII<sup>73</sup>. The present Duke of Cornwall, Prince Charles was created Earl of Chester and Prince of Wales by letters patent on 26<sup>th</sup> July 1958 and invested with the insignia on 1<sup>st</sup> July 1969. Each Prince of Wales and Earl of Chester is a new creation<sup>74</sup>, the Dukedom of Cornwall is not. It is not possible under the Charter of Creation for a female to be Duke of Cornwall in contrast to the position of the Duchy of Lancaster. Since Prince Charles was a minor when his mother became Queen Elizabeth II he did not enjoy his full rights as Duke of Cornwall until he was 21 in 1969<sup>75</sup>. Therefore from 1936 until 1969 either there was no Duke of Cornwall or the Duke was a minor and for those 33 years the Duchy was administered directly by the Crown or administered on behalf of the Duke. If Charles had died before the birth of his sons then Prince Andrew, even though he is not the first born son of the Sovereign, would have become Duke of Cornwall being the eldest living son of the monarch and heir apparent. If Charles were now to die before succeeding his mother then Prince William, even though heir apparent, would not automatically become Duke of Cornwall since he is not the son of a monarch and, therefore not within the limitations of the Charter. In those circumstances the Sovereign could, however confer the titles Prince of Wales and Earl of Chester on Prince William if she wished to do so. She could also, like Edward III, make her grandson Duke of Cornwall but he would not become entitled, as of right, to the income from the Duchy. However, provision would be made for him from the income of the Duchy of Cornwall as heir to the throne following the Sovereign Grant Act 2011<sup>76</sup>.

Since the Duchy was created over 670 years ago there has been no Duke for approximately half that time and for a significant period of the remainder when there has

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<sup>72</sup> Halsbury's Laws of England Volume 12 (1) The Royal Family/The Heir Apparent and his wife.

<sup>73</sup> For further see Fisher, D., *Princesses of Wales* (2005). Mary was asked to surrender the title when her half sister was born.

<sup>74</sup> *Prince Henry's Charter Case* (1611) (1 Bulst 133)

<sup>75</sup> Duchy of Cornwall Management Act 1863 section 38 as amended by the Family Law Reform Act 1969 section 10(3). The age of majority in respect of any future Duke's entitlement to administer the Duchy is now 18.

<sup>76</sup> The Succession to the Crown Bill 2013 provides that an eldest child, regardless of gender, will be heir to the throne. There has been some discussion what consequence this would have for the Duchy of Cornwall. See, for example the article by Heffer, Simon "Why didn't they talk to Charles before this mad scramble?" *Daily Mail* 7<sup>th</sup> January 2013

been a Duke he has been a minor. For only eight years between 1376 and 1714 was there a Duke of full age. So the Duchy has been administered, one way or another, by the Crown for some two-thirds of the time since it was created.

The Duchy of Lancaster, which grew out of the Earldom of Lancaster, was created a Duchy by Charter in 1351. By the same Charter Lancaster was raised to a County Palatine. In 1399 when Henry Bolingbroke usurped the throne and became Henry IV he provided again by Charter that the Duchy shall always be held separately from the throne. The mode of descent set out in the 1399 Charter has not been adhered to but that is a discussion for another time. The Duchy of Lancaster is always in the Crown, the monarch, whatever their gender, is always Duke of Lancaster. This difference between the Duchy of Cornwall and the Duchy of Lancaster is significant. The Duchy of Cornwall oscillates between a Duke, from time to time, and the Crown when there is no Duke which creates ambiguity about its legal status. By contrast the position of the Duchy of Lancaster is clear it passes from Sovereign to Sovereign without a break.

The Duchy of Cornwall is sometimes in the Crown and sometimes in the hands of the Duke. Is the Duchy part of the Crown or is it not part of the Crown? Is the Duchy part of the Crown only during those periods when there is no Duke of Cornwall or the Duke is a minor; and while there is a Duke of full age is it a 'private estate' as that term is generally understood? The answer to such questions determines whether the Duchy is entitled to enjoy the privileges of the Crown.

Edward III was, without doubt, a constitutional innovator. It was he who came up with the idea of the Order of the Garter after all. The creation of an English Dukedom is not a great surprise since it is an idea which appears to have been imported from his French possessions. However no convincing explanation has been offered for the source of the notion of creating such a unique form of conditional entail. Why not provide that the Duchy of Cornwall, like the Principality of Wales and Earldom of Chester, should not be a new creation each time? The issues arising from this strange form of descent have vexed jurists for centuries and have been the cause of continuing constitutional tensions. Furthermore, while it is clear that the Duchy of Cornwall has many characteristics in common with Counties Palatine it was not formally designated as such while the Duchy of Lancaster created only 14 years later is so described. The situation was summarised



well in 1795 when it was said “That peculiarity of limitation and a certain want of discrimination in after times have given birth to much confusion and obscurity”<sup>77</sup>. That description of the Duchy of Cornwall was confirmed by Lord Tenterden in *Rowe v Brenton* (1828) who said it is “..of a very peculiar nature”<sup>78</sup>.

*L* “..to the same forever to remain..”

The Charter of Creation clearly intended that the property granted to the Duchy should be “annexed forever” to the Duchy and could only be alienated by Act of Parliament. The Duke could enjoy the income from the assets within the Duchy but not the capital. (Nowadays we would call such an arrangement an “interest in possession trust”) When the Duchy has reverted to the Crown this provision has often been ignored particularly during the time of Richard II and Elizabeth I. Henry IV and James I litigated to seek recovery of Duchy property improperly disposed of by their predecessors. The courts have been clear that, in principle, the land granted is inalienable, see *The Prince’s Case* (1606); *Attorney General v Ceely* (1660)<sup>79</sup> and *Lopez v Andrew* (1826)<sup>80</sup>. The inalienability of Duchy of Cornwall land was changed by the Land Taxes Act 1798 and the Duchy of Cornwall Act 1844 section 1.

## *M Conclusion*

There are many unanswered questions with regard to the Duchy of Cornwall. Why was such a “strange mode of descent” with its “peculiar limitation” established? The fact that the Duchy was limited to male heirs, given the attitude of the time is understandable; for the rest we can only speculate. Why was the Duchy not made a County Palatine? (See Appendix E for discussion on County Palatines.) Whatever the motivations, the institution continues to exist more than 670 years since its creation. Its legal foundation remains the Charters supplemented now by a “bespoke” statutory arrangement. The Charters are not dusty fragile pieces of vellum sometimes disinterred for the curious to examine. They are the basis of many of the property rights still enjoyed by the Duchy. They also grant to the Duchy significant privileges, whose full extent is not agreed and which the Duchy exploits for its economic advantage. An understanding of the Charters,

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<sup>77</sup> Watkins, op. cit. p 15

<sup>78</sup> *Rowe v Brenton* (1828) (8 B & C 737) p 1224

<sup>79</sup> *Attorney General v Ceely* (1660) (Wight 208)

<sup>80</sup> *Lopez v Andrew* (1826) (3 Man & Ry K.B. 329n)

including their ambiguities, is the starting point upon which the rest of this work develops.

## Chapter 3

### The Duchy of Cornwall 1337 – 1837

*“Of all Cornwall, Duke am I,  
As was also my father.  
A great lord in the country,  
From Land’s End to the Tamar.”<sup>1</sup>*

#### A Introduction

This Chapter provides a background to the Duchy for the five hundred years from its establishment to the accession of Queen Victoria. It focuses on the legally significant events which have shaped the Duchy. It is not a detailed history. The aim is to construct a foundation to enable a better understanding of the Duchy today.

The period of English history from 1307 until 1485 was pretty dismal. Of the nine descendants of Edward I who reigned during that time four lost their crowns and died violently and a fifth was temporarily disposed and forced into exile<sup>2</sup>. The story of the Duchy for this period should be seen against this background,

#### B 1337 – 1376 - The Government of the Black Prince

Cornwall was regarded as “still part of the Celtic fringe with its own language and autonomous spirit”<sup>3</sup>. From the creation of the Duchy until the death of the first Duke in 1376 it is no exaggeration to say the government of Cornwall was either the household of the Black Prince or the Prince’s Council which he established in 1343. The Council was a creature of the Prince. It had no power and influence except that which it was given by the Prince. It is a precedent followed by succeeding Dukes including the present one. In fact the first Duke of Cornwall visited Cornwall rarely and, as with his other possessions, was most interested in extracting funds to finance his and his father’s military activities. The financial demands created by the various campaigns were considerable and money was in short supply.

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<sup>1</sup> Combellack, Dr Myrna, *The Camborne Play: A Verse Translation of Beunans Meriasek*, (1988) pp 96-98

<sup>2</sup> Lyon, Ann, *Constitutional History of the United Kingdom* (2002) p 80

<sup>3</sup> Tyldesley C. J., *The Crown and the Local Communities in Devon and Cornwall from 1377 to 1422* (1978) Thesis (Ph. D.) University of Exeter

Although only seven at the time when Edward (The Black Prince) was created Duke of Cornwall (his father was twenty five) he was already, from 1333, Earl of Chester and as such lord of the county of Flint, annexed to the Earldom of Chester by the 1284 Statute of Wales. The title of Earl of Chester, which dates from 1070 or 1071, was annexed to the Crown in 1237. It had its own Exchequer, a register of original writs and powers of taxation<sup>4</sup>. He was to become Prince of Wales on 12<sup>th</sup> May 1343: a further means of training the heir to the throne in the work of government<sup>5</sup>.

The Principality of Wales has interesting parallels with the Dukedom of Cornwall which had been built on the previous Earldom of Cornwall. For:

“...the title which the Black Prince obtained was created by the English King, the sum total of rights and powers which he acquired and sought to establish in Wales were those rights and powers which had been assembled and welded into a *principatum*<sup>6</sup> by the energy and genius of the last Llewelyn. The claims made by the Black Prince’s Council are an unconscious tribute to the work of the first Prince of Wales.”<sup>7</sup>

The English and Welsh titles enjoyed by the Black Prince and subsequent Dukes of Cornwall were all built on existing structures of “quasi independent” franchises enjoying some freedom from the centre.

Edward III created the Duchy of Lancaster, the other Royal Duchy, in 1351. In 1362, Edward (The Black Prince) was created the first Prince of Aquitaine. Over time the Black Prince was to become the direct ruler of a significant area of England and Wales and of a part of France. The Duchy of Cornwall was but one, albeit, important element in this medieval structure. One writer has claimed that; “As far as can be ascertained, he had, when of age, a free hand in the government of his domains.”<sup>8</sup>

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<sup>4</sup> Barraclough, G., “The Earldom and County Palatine of Chester” (1951) *Transactions of the Historical Society of Lancashire and Cheshire* Vol CIII p 36

<sup>5</sup> Evans, D. L., “Some Notes on the History of the Principality of Wales in the time of the Black Prince (1343-1376)” (1925-1926) *The Transactions of the Honourable Society of Cymmrodorion* p 29

<sup>6</sup> First in rank in state

<sup>7</sup> Evans, op. cit. p 29

<sup>8</sup> Evans, op. cit. p 29

To place the position of Cornwall in context, as was explained by Margaret Sharp in her examination of the administrative system of the Black Prince:

“(The) king’s wives or sons, magnates of church and state, might enjoy semi-regal franchises to the detriment of royal authority, but within each little state within a state, each cross-section of scattered territories and single government, the tentacles of uniformity were tightening their hold.”<sup>9</sup>

The government of Cornwall was not unique. The Black Prince had more power in Chester because of its palatine status than within Cornwall. Having said that Sharp does agree with other writers in that she says:

“The Duchy in its strictest sense knew in the fourteenth century no governmental unity save the control of the Black Prince’s central system..”<sup>10</sup>

She also said “Ducal officials were responsible for the administration and the King’s ministers were excluded from the Duke’s lands.”<sup>11</sup> While the courts were administered by central government, the itinerant justices who came to Cornwall for the assizes were also permanent members of the Prince’s Council<sup>12</sup>. The Duchy directly owned seventeen manors together with the castles of Launceston, Trematon, Tintagel, Helston Restormel. The boroughs of Launceston, Lostwithiel, Tintagel, Helston, Camelford, Grampound, Liskeard and Saltash were under Duchy control. The Duchy appointed the Sheriff.

All royal writs, although issued in the King’s name, were returned to the Duke’s officials including the election writs to Parliament. This was not the case in the Earldom of Chester or later in the Duchy of Lancaster where writs were issued in the name of the Earl or Duke respectively.

The importance of the Medieval Sheriffs has been emphasised but during the course of the fifteenth century their powers diminished as these were transferred to Justices of the Peace<sup>13</sup>.

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<sup>9</sup> Sharp, Margaret, “The Central Administrative system of Edward, The Black Prince” in Tout, T.F., (Ed) *Chapters in the Administrative History of Medieval England Volume 5* (1930) p 295

<sup>10</sup> *Ibid* p 299

<sup>11</sup> *Ibid* p 298

<sup>12</sup> Pearse, R., *The Land Beside the Celtic Sea* (1983) p 52

<sup>13</sup> Lyon, op. cit. p155

The Duke appointed the escheator who was concerned with the seizure of land that fell to the Duchy, its temporary administration and its eventual transmission to a new owner or tenant. It does appear that despite the later claims of the Duchy, the right to escheats was limited to the Honour's<sup>14</sup> of Trematon, Launceston and Bradninch only, the King later took to himself escheats for high treason<sup>15</sup>. At this stage there was no question of the Duchy enjoying escheat for the whole of Cornwall.

The Duchy was responsible for the appointment of a "Havener" or "keeper of the waters of the King's ports in Cornwall". The duties included enforcing the Duke's right to wreck and royal fish. Another royal prerogative for which the Havener was responsible was "waif": - goods forfeited because they were abandoned by their owners or because their owners were thieves fleeing justice<sup>16</sup>. The collection of the prisage of wine was also a function of the Havener. The profits arising from Maritime Courts at which disputes between mariners and merchants were adjudicated benefited the Duchy. There was stubborn insistence by the Duchy; "on the right to hold Maritime Courts well into the 16<sup>th</sup> century despite laws granting exclusive jurisdiction to the Lord High Admiral in maritime matters."<sup>17</sup>

The Duke received the revenues of the Stannaries which represented a significant proportion of ducal income. In particular "tin coinage", which was a tax imposed on smelted tin and not finally abolished until 1838<sup>18</sup>. He regulated the affairs of the Stannaries; the Prince's Council was the fountainhead of all Stannary administration. He appointed the Lord Warden to act as his representative in governing the Stannaries and named their officers. The Dukes summoned the Tinnars Parliaments, assented to their legislation and promulgated new laws and enactments. The Lord Warden was responsible for the Stannary Court system, which was outside the purview of the "normal" courts, and continued to be so until finally abolished in 1896<sup>19</sup>.

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<sup>14</sup> In medieval England an Honour could consist of a great lordship comprising dozens or hundreds of manors.

<sup>15</sup> Clowes, R L., "Escheators of Devon and Cornwall" (1931-32) *Devon and Cornwall Notes and Queries* Volume XVI p 201

<sup>16</sup> Kowaleski, Maryanne, *The Havener's Accounts of the Earldom and Duchy of Cornwall 1287 1356* (2001) p 27

<sup>17</sup> *Ibid* p 43

<sup>18</sup> Coinage Abolition Act 1838

<sup>19</sup> Stannary Courts (Abolition) Act 1896

Of course, in addition to the above the Duke appointed bailiffs, feodarys, reeves, stewards, auditors and receivers. The Duke's "practical influence extended into virtually every hamlet in Cornwall"<sup>20</sup>. It is, perhaps, not surprising Edward, the Black Prince, could in 1354 begin an address as follows: "...to all the faithful men and *subjects* (emphasis added) of the Duchy of Cornwall..greetings.." <sup>21</sup>.

No subsequent Duke exercised as much authority as the Black Prince although some attempt was made, particularly during the reigns of Henry VII and James I, to replicate what he had achieved. What is remarkable is how much survives from the earliest days of the Duchy. It is not difficult to understand why John Angarrack and others claim "...Cornwall was, for all intents and purposes, a Crown dependency similar to the Isle of Man and the Channel Islands."<sup>22</sup>

### *C 1376 – 1485 - York and Lancaster*

The safeguards built into the Charters which created the Duchy, including the mode of descent and the fact the lands were intended to be inalienable, were ignored. Not for the last time in its history, the Duchy was almost destroyed during Richard II's reign. On the 20<sup>th</sup> November 1376, following the death of the Black Prince, his nine year old son Richard was created, by Charter, Prince of Wales, Duke of Cornwall and Earl of Chester by which titles he was styled until he ascended the throne in 1377 to become Richard II. Clearly since Richard was not the eldest son of a reigning monarch he was outside the terms of the Great Charter of Creation of 17<sup>th</sup> March 1337. It is probable that Edward III was concerned to secure the succession, the principle of primogeniture having not at this time been established, and by granting these titles to his grandson established Richard as rightful successor. Richard, during the twelve months or so he was heir never enjoyed the income from the Duchy which was paid to the Royal Household. During the reign of Richard II Duchy lands were used to reward members of the Royal Household including the Earl of Huntington, John of Cornwall and others. Richard II's wife, Queen Anne, after her coronation in 1382 was ceded the Duchy manors in Cornwall. Dr. Tyldesley has suggested "...it could be said that the machinery of the Duchy was more or less dismantled

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<sup>20</sup> Haslam, G., "Evolution" in Gill, C., (Ed.) *The Duchy of Cornwall* (1987) p 27

<sup>21</sup> Acts of the Council of the Black Prince 18<sup>th</sup> August 1354

<sup>22</sup> [duchyofcornwall.eu/duchy01.php](http://duchyofcornwall.eu/duchy01.php)

in the second half of the 1390's"<sup>23</sup> In fact Haslam says "...in effect the Duchy existed in name only."<sup>24</sup>

Richard was deposed in 1399 by Henry IV, who as early as 15<sup>th</sup> October 1399 issued writs to his escheators ordering them to seize lands belonging to the Duchy.<sup>25</sup> On 10<sup>th</sup> November 1399 there was a Statute passed declaring the eldest son of Henry IV, also called Henry (Shakespeare's Prince Hal) Prince of Wales, Duke of Aquitaine, of Lancaster and of Cornwall, and Earl of Chester<sup>26</sup>. Following a petition from Parliament Henry IV transferred the livery of the Duchy of Cornwall to his son Prince Henry in 1404 who, in the same year was given leave to proceed by Parliament against the holders of Duchy lands<sup>27</sup>. He was only partially successful.

In 1413 Henry V succeeded his father to the throne. For the next forty years until 1453 the Duchy was in the possession of the Crown. In 1421 by Act of Parliament certain lands were severed from the Duchy and additional lands were granted. In 1422 Parliament affirmed that "...the County of Cornwall should always remain as a Duchy to the Eldest son of the King of England..<sup>28</sup>

Duchy lands were granted to favourites and used to secure political advantage. The Charters, so carefully crafted by Edward III, were simply ignored if it was expedient to do so.

### *D The Prince's Council*

The Prince's Council created in 1343 during the time of the Black Prince was based in Westminster. It was the means by which he governed his various possessions including the Duchy of Cornwall was one part. Edward IV, in 1471, established a Prince's Council, later known as the "council in the marches of Wales"<sup>29</sup>, centred from 1473 in Ludlow which, with periods of abeyance most notably under the reigns of Richard III and the first

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<sup>23</sup> Tyldesley op. cit.

<sup>24</sup> Haslam, op. cit. p29

<sup>25</sup> Tyldesley, op. cit.

<sup>26</sup> Hardy, Sir W., *The Charters granted by The Crown to The Duchy of Lancaster* (1845) p141

<sup>27</sup> Tyldesley, op. cit.

<sup>28</sup> Tidal Estuaries, Foreshore, and Under-Sea Minerals within and around the Coast of the County of Cornwall Duchy of Cornwall 1854-1856 – Arbitration by Sir John Patteson Preliminary Statement by the Duchy p11

<sup>29</sup> Clayton, Dorothy, *The Administration of the County Palatine of Chester 1442- 1485* (1990) p 56



six years of the reign of Henry VII, sat until 1509. It was charged with the administration of the Principality of Wales, Duchy of Cornwall and County of Chester. The Prince's Council was very different from its contemporary incarnation. It became, after 1502 and the death of Prince Arthur, the "regional branch of the king's council"<sup>30</sup>. It had a very important role as a governmental institution under Edward IV and continued that purpose under Henry VII<sup>31</sup>. The Prince's Council was the focal point of Royal Authority in the Marches of Wales and surrounding areas and was concerned to co-ordinate the administration of justice in the entire region<sup>32</sup> including of course the Palatine County of Chester. The Prince's Council heard increasing numbers of petitions from individuals throughout the Prince's domains and arbitrated disputes in the Prince's lands. It was also tasked with superintending the execution of justice in Wales, Shropshire, Worcestershire, Herefordshire and Gloucestershire<sup>33</sup>.

To understand the changing nature of the Duchy of Cornwall over time it is important to recognize that at the end of the fifteenth and the beginning of the sixteenth century the Duchy of Cornwall was one part of the land and possessions of the heir to the throne whose obligations extended beyond simply maximising the income generated by those possessions. The governance of the possessions of the heir to the throne was a training ground for Government.

## *E 1485 – 1603 - The Tudors*

### Background

From the accession of Henry VII to the death of Elizabeth I the Duchy of Cornwall faced many challenges. It survived, but only just, demonstrating once again its remarkable resilience. By the end of the reign of Elizabeth I:

"The Duchy had plumbed the depths of its fortunes....It existed as an administrative backwater, surviving only because it had been in part forgotten.." <sup>34</sup>

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<sup>30</sup> Pugh, T.B., *The Ending of the Middle Ages 1485-1536* (1971) p 562

<sup>31</sup> Worthington, P., *Royal Government in the Counties Palatine of Lancashire and Cheshire 1460 – 1509* (1990) Thesis (Ph. D.) University College of Swansea

<sup>32</sup> Ross, C.D., *Edward IV* (1974) pp 196-7

<sup>33</sup> Worthington, op. cit.

<sup>34</sup> Haslam, G., "The Elizabethan Duchy of Cornwall, an estate in stasis" in Hoyle, R.W., (Ed.) *The Estates of the English Crown 1558-1640* (1992) p 111

It was brought, Haslam says, to “near extinction”<sup>35</sup>.

For seventy nine of the one hundred and eighteen years of Tudor rule there was no Duke of Cornwall. For the remaining thirty nine years the Duke was a minor who was never in a position to exercise a policy distinct from the Crown. The Duchy was important to the Tudors because it offered a “rich source of patronage to reward prominent local men as well as courtiers”<sup>36</sup>. In addition the income derived from the Duchy; in particular that of tin was important<sup>37</sup>.

Opinions about the status of the Duchy during this period differ. A. L. Rowse could say:

“Altogether the Duchy was a little government of its own, with a whole hierarchy of officials, from those in London attendant upon the King or the Duke down through the officials in Cornwall...”<sup>38</sup>

Chynoweth takes a different view<sup>39</sup>:

“To all intents and purposes Cornwall was throughout this period governed by the sovereign who delegated authority to exactly the same kind of officials as those in any other English County.”<sup>40</sup>

The local government of Cornwall was controlled, as elsewhere in England by officials appointed by the Crown, including the Justices of the Peace and escheators, and those appointed by the Duchy, for example, the Sheriff, the Duchy escheators, feodaries and havenors. The Crown also appointed an escheator. There was the parallel set of Stannary officials, including a Lord Warden of Stannaries, who “exercised authority over mining customs, disputes and military mustering of all men who were accepted as tinnners”<sup>41</sup>. The Duchy may have been controlled by the Crown but it continued to be distinct.

The Sheriff remained an important local official despite the fact his power had declined and some of his influence was transferred to Justices of the Peace who were now the most important local government officials at county level. Nevertheless the Sheriff was still

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<sup>35</sup> Haslam, G., *An Administrative Study of the Duchy of Cornwall 1500-1650* (1980) Thesis (Ph. D.) Louisiana State University

<sup>36</sup> *Ibid*

<sup>37</sup> *Ibid*

<sup>38</sup> Rowse, A. L., *Tudor Cornwall* (1941) p 82

<sup>39</sup> See also Cooper, J.P.D., *Propaganda and the Tudor State* (2003) pages 171 et seq

<sup>40</sup> Chynoweth, J., *Tudor Cornwall* (2002) p 28

<sup>41</sup> Chynoweth, J., *The Gentry of Tudor Cornwall* (1994) Thesis (Ph. D.) University of Exeter

responsible for summoning *posse comitatus*<sup>42</sup>, collecting the ancient taxes of tenths and fifteenths for the serving of writs, the empanelling of juries, the execution of processes at quarter sessions and the supervision of the election of the Knights of the Shire<sup>43</sup>.

The posts of escheator and feodary, who had quasi-legal powers and presided at a court, were sometimes combined. In summary Duchy officials had the right to:

“..sieze goods of outlaws and felons, to exercise wardship, to distrain anybody who held of the Prince who had not properly been granted livery and to take reliefs. In addition Duchy officers had the exclusive right to return all writs to his lands..the havener collected certain custom dues at major ports..ensured that the right to wreck and royal fish in Cornwall was not encroached by crown officers..”<sup>44</sup>

The efficient government of Cornwall and Devon was regarded as especially important for a number of reasons. They were seen as:

“..a potential powder keg: politically restless, economically troubled, conservative in religion, militarily vulnerable to invasion and remote from central government.”<sup>45</sup>

Cornwall in particular was considered to be “unruly and rebellious”<sup>46</sup>. There were two uprisings in 1497/98, riots in 1514 and 1548 and a “Prayer Book rebellion” in 1549. The rebellions of 1497 and 1549; “...were to Cornwall what those of 1715 and 1745 were the Highlands of Scotland” according to Rowse<sup>47</sup>. Chynoweth by contrast points out there were uprisings in other parts of England, for example, Yorkshire in 1489 (taxation and Yorkism), Suffolk in 1525 (taxation), Lincolnshire in 1536 (religious issues and taxation) and in Devon in 1536 (religious issues, taxation and economic grievances)<sup>48</sup>.

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<sup>42</sup> County militia

<sup>43</sup> Speight, H.M., *Local Government and Politics in Devon and Cornwall 1509-1549 with Special Reference to the South West Rebellion of 1549* (1991) Thesis (Ph.D.) University of Sussex

<sup>44</sup> Haslam, G., *An Administrative Study of the Duchy of Cornwall 1500-1650* op. cit.

<sup>45</sup> Robertson, Mary L., “The Art of the Possible: Thomas Cromwell’s Management of West Country Government” (1989) *The Historical Review* Vol 32 No. 4 p 794

<sup>46</sup> Chynoweth, J., *The Gentry of Tudor Cornwall* op. cit.

<sup>47</sup> Rowse, op. cit. p 10

<sup>48</sup> Chynoweth, J., *Tudor Cornwall* op. cit. p 30

For a brief period from the spring of 1539 until Midsummer 1540 a Council of the West was established, covering the areas of Dorset, Somerset, Devon and Cornwall, for the:

“...purpose of tightening up the machinery of justice and administration in an unsettled part of the Kingdom, and in particular as a means of forestalling the trouble which was expected to follow the dissolution of the monasteries in the region.”<sup>49</sup>

Dr. Rowse described the Council as “an experiment in direct government”<sup>50</sup>. The government needed to keep a weather eye on the South West. The memory of the risings of 1497 against royal taxation and then in support of Perkin Warbeck<sup>51/52</sup> lingered.

The tinnerns of Cornwall especially were viewed with suspicion<sup>53</sup>: they “were a body of notoriously lawless men”<sup>54</sup>. They were described to Burghley in 1586 in the following terms: “so rough and mutinous a multitude, whose number we judge to be ten thousand or twelve thousand, the most strong, able men of England”<sup>55</sup>. In 1589 Cornwall was characterised by the Privy Council as “that disordered county”<sup>56</sup>. The geography of Cornwall made it vulnerable to attack. As Richard Carew in 1602 described it:

“..nature have shouldered out Cornwall into the farthest part of the Realme, and so besieged it with ocean, that, as a demie Iland in an Iland, the inhabitants find but one way of issue by land..”<sup>57</sup>.

It was important because of the need to avoid the evasion of the tax on tin a significant source of income to the crown. The cultural isolation also posed problems for the government when Cornish still rivalled English as the language of the common people<sup>58</sup>.

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<sup>49</sup> Youings, J.A., “The Council of the West” (1960) *Transactions of the Royal Historical Society* 5<sup>th</sup> Series, Part No x p 41

<sup>50</sup> Rowse, A. L., *The Expansion of Elizabethan England* (1955) p 36

<sup>51</sup> Youings, op. cit. p 44

<sup>52</sup> Pretender to the English throne claimed to be Richard, Duke of York younger son of Edward IV one of the princess in the Tower whose murder in the Tower some doubted

<sup>53</sup> In fact miners generally including, for example, the lead miners of the Derbyshire Peak were also viewed with suspicion see Cooper, J.P.D., *Propaganda of the Tudor State* (2003) p 195

<sup>54</sup> Chynoweth, J., *The Gentry of Tudor Cornwall* op. cit.

<sup>55</sup> Chynoweth, J., *Tudor Cornwall* op. cit. p 161

<sup>56</sup> Acts of the Privy Council xvii p 319

<sup>57</sup> Carew, R., *The Survey of Cornwall* (1602) folio 56v

<sup>58</sup> Robertson, op. cit. p794

Cornish continued to be spoken by a significant number of the population. Indeed the Venetian Ambassador, stranded in Penryn by bad weather, reported in 1506

“We are....in the midst of a barbarous race, so different in language and customs from Londoners and the rest of England that they are as unintelligible to these last as to the Venetians.”<sup>59</sup>

In 1508, following the rebellion of 1497 Henry VII had granted a Charter of Pardon which:

“..restored the Cornish Stannaries..created new, widespread powers affecting both the privileges of the tanners and the legislative capacity of the Convocation of the Tanners of Cornwall. It extended the definition of “tanner” and hence the jurisdiction of the Stannaries and Stannary Law which jurisdiction was to be extended even further by the Stannary Parliament of 1588.”<sup>60</sup>

The Duchy was the largest landlord in Cornwall: it held 17 manors until 1540 and 41 from then until 1601 when Elizabeth sold 18 those these were subsequently recovered by James I.

By 1601 Cornwall returned 44 Members of Parliament or 10 per cent of the total membership of Parliament, a figure quite disproportionate to the population of the County in relation to the rest of England and Wales<sup>61</sup>. No entirely satisfactory explanation has been offered for this curious situation<sup>62</sup>. Clearly Cornwall retained many

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<sup>59</sup> Cited by Rowse, op. cit. p 117

<sup>60</sup> Payton, P., *Modern Cornwall: The Changing Nature of Peripherality* (1989) Thesis (Ph.D.) Polytechnic of the South West

<sup>61</sup> Payton, P., *Cornwall – A History* (2004) p128

<sup>62</sup> Baring-Gould, S., in *Cambridge County Geographies – Cornwall* (1910) offers the following explanation “The old borough that existed before the reign of Edward VI were Truro, Helston, Lostwithiel, Bodmin, Liskeard and Launceston. But the advisers of Edward VI, conscious of the insecure tenure of the throne and doubting whether the country was willing to go with them in their sweeping alterations in religion, and desirous of counteracting and growing importance of the House of Commons, considered that their object would be best attained by conferring the right of returning members of Parliament upon obscure dependent villages of Cornwall. Accordingly Saltash, Camelford, West Looe, Bossiney, Grampound, Penryn, Mitchell and Newport were elevated into boroughs, each returning two members of Parliament. Under Queen Mary, St Ives received the same privileges and under Elizabeth six more were made boroughs with the same rights, St Germans, St Mawes, Tregony, East Looe, Fowey and Callington. Some of these places were mere hamlets.” p 1002

distinct features “...one of the remotest and least populated counties of the kingdom had come to send more members to the commons than any other shire.”<sup>63</sup>

Cornwall was “an isolated part of the Celtic fringe it had inherited different traditions and customs”<sup>64</sup>. It was a “wild spot where no human being ever comes, save the few boors who inhabit it.”<sup>65</sup>

### Henry VII and Beyond

When Henry VII first came to the throne he set about repairing the depredations of his predecessors. Some Duchy lands were recovered by Acts of Parliament repealing previously made gifts. The Duchy and other possessions were granted to Prince Arthur, the King’s eldest son in 1499. There is no doubt Henry VII intended that Prince Arthur was to govern his lands. Arthur was the last “truly autonomous medieval heir”<sup>66</sup>. However Henry VII’s plans were brought to nothing by the death of his eldest son in 1502. In 1504, by Act of Parliament, Henry of Greenwich, later Henry VIII, was made Duke of Cornwall although he was never allowed the income from the Duchy.

Henry VIII ascended to the throne in 1509 and retained the income from the Duchy for his personal use. Following a precedent set by Henry V, Henry VIII secured an Act of Parliament by which certain lands were severed from the Duchy and 28 manors added, including the Isles of Scilly, which came from the Priors of Launceston and Tywardreath, following the dissolution of the monasteries, and from the lands of the Marquis of Exeter who had been tried and executed for treason in 1539. The Duchy remained the largest landlord in Cornwall by far but the properties were managed by local officials for a permanently absentee landlord.

As part of the centralisation which accompanied the Tudor state various jurisdictional franchises and liberties were brought to an end. In particular by Act of Parliament in 1536 England and Wales were united in one Kingdom with English law applying throughout the Principality. By 1542 many of the specific powers of the Palatine County of Chester

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<sup>63</sup> See Cooper, J.P.D., *Propaganda and the Tudor State* (2003) p 180 in which the issue is explored in some detail

<sup>64</sup> Haslam, G., *An Administrative Study of the Duchy of Cornwall 1500-1650* op. cit.

<sup>65</sup> Robertson, op. cit. p794 quoting Venetian Ambassador 1504.

<sup>66</sup> Haslam, G., “Evolution” in Gill, C., (Ed.) *The Duchy of Cornwall* op. cit. p30

had been abolished. This was also the period which saw the emergence of identifiable departments of State distinct from the King's household.

In 1542 further land was severed from the Duchy, without compensation and without benefit of Act of Parliament in clear breach of the original Charter.

Henry VIII was followed in 1547 by his son Edward VI, who was Duke of Cornwall from his birth but never enjoyed the income from the Duchy until he became King. In 1553 Edward VI was succeeded by his half sister Mary. After the death of Mary, Elizabeth I became Queen in 1558.

Elizabeth I "showed no interest in the Duchy of Cornwall or its purpose"<sup>67</sup>. It is not surprising since she had no concern with an estate dedicated to the honour and maintenance of a male heir. When the need for money became great Crown lands were sold. This included 18 Duchy manors, despite their inalienable status, which had been properly annexed to the Duchy following the passing of Acts of Parliament.

The Duchy was saved from further piecemeal destruction by the death of Elizabeth. Deacon says;

"..the survival of the Duchy may seem to be anomalous in an English state that set about eradicating local peculiarities with relish after the 1530s, the Acts of Union with Wales and the abolition of the (palatine) earldom of Chester being prime examples."<sup>68</sup>

However, it did survive and retained a significant number of rights particularly in relation to Cornwall.

The case of *Chasyn v Sturton*, heard in 1553 during the reign of Elizabeth I confirmed, amongst other things, that:

"King Edward III being seised of the county of Cornwall, and of divers possessions thereto appertaining in Cornwall....*it was enacted in parliament holden in the 11<sup>th</sup> year of his reign* that he should make his eldest son...Duke of Cornwall..that the said county should be given to the said Edward the son; as in name of Duchy..that this county of Cornwall should always remain as a duchy to

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<sup>67</sup> Haslam, G., "Evolution" in Gill, C., (Ed.) *The Duchy of Cornwall* op. cit. p36

<sup>68</sup> Deacon, B., *Cornwall – A Concise History* (2007) p 81

the eldest sons of the kings of England who should be next heirs of the realm, without being otherwise disposed of....”<sup>69</sup> (emphasis added)

### *F 1603 – 1714 - The Stuarts*

The accession of James I to the throne of England, (he was, of course, already James VI of Scotland) heralded a renaissance in the fortunes of the Duchy. A difficulty which had to be overcome was the fact that, because of the neglect to which the Duchy had been subjected, it was difficult to determine what offices and duties existed in such an arcane institution<sup>70</sup>. Rowse explained:

“The long dormancy in the Crown from 1547 to 1603 meant much slackening of administrative efficiency, rents were lost or became submerged encroachments were made upon its commons....”<sup>71</sup>

The Duchy surveyor, in 1615, visited twenty six manors. Many tenants refused to answer his questions or to show their deeds so he could establish by what right they owned their properties. He reported that tenants found it easier to defraud the Duchy rather than private landlords because the Duchy lacked the resources to police its great number of tenants<sup>72</sup>.

John Norden writing at the beginning of this period as a summary of the position as he understood it, explained:

“His Highness, by his Honour is privileged with sundry jurisdictions and Royalties (as have been former Dukes) who hath the return of writs, customs, tolls, treasure trove, wardships<sup>73</sup>, mineral rights, right of gold and of silver<sup>74</sup> the last two much abounding in the Duchy.”

Later in the same work he describes functions and rights enjoyed by the Duchy:

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<sup>69</sup> *Chasyn v Lord Sturton* (1553) (1 Dyer 94a) p 205

<sup>70</sup> Haslam, G., “Jacobean Phoenix the Duchy of Cornwall in the principates of Henry Frederick and Charles” in Hoyle, R.W., *The Estates of the English Crown 1558-1640* (1992) p 264

<sup>71</sup> Rowse, op. cit. p 50

<sup>72</sup> Chynoweth, J., *Tudor Cornwall* op.cit. p 131

<sup>73</sup> When a tenant of Crown land died and left an underage male heir, the boy became a ward of the Crown. The king/queen was meant to look after the boy until he came of age. However, in practice this responsibility of guardianship was sold off to the highest bidder who used his position to exploit the ward's land to its greatest extent. The Crown then made more money by requiring the ward to pay for his land once he came of age.

<sup>74</sup> The right of the Duchy to Gold and Silver in Cornwall is disputed.



“Admiral of the Sea Coast, Customs, Comptroller, Excheator, Feodary, Auditor, Surveyor, powers to punish and pardon offences committed within the limits of the Dukedom and others are at the Highness disposal.”<sup>75</sup>

The Duchy embarked on the task of retrieving lands sold hastily during the reign of Elizabeth. It was decided by Chief Justice Coke in *The Prince's Case*<sup>76</sup> that land annexed to the Duchy by statute could only be severed by a subsequent Act of Parliament. It took some years before the properties were restored. Indeed between 1607 and 1615 thirty two actions were threatened or initiated and it was only in 1630 that the process was completed.

The decision of Chief Justice Coke is very important, and is quoted often for reasons other than the narrow question of the restoration of various manors and estates. He decided that the Great Charter or Charter of Creation must be by Act of Parliament, confirming the earlier judgement in *Chasyn v Lord Sturton*, because:

“..the course of inheritance being against the rules of common law cannot be created by charter without the force and strength of an Act of Parliament.”

He also said possession could not be annexed in an “indissoluble and inseparable manner” without the force of a Parliamentary Act. Similarly it would be impossible that “an estate in land should cease and revive again as by clause of revivication is intended by charter”. Lord Coke confirmed:

“Cornwall and the county of Cornwall should always remain as a duchy to the eldest sons of the Kings of England who shall be next heirs to the said realm without being given elsewhere.”

In addition the Chief Justice decided that a Duke of Cornwall could not bind his successor. A source of much inconvenience until it was resolved by the Duchy of Cornwall Act 1844.

Prince Henry, James I eldest son and heir, became Duke of Cornwall on his father's assuming the throne in 1603. He was the first Duke of Cornwall for fifty years and the first to hold the twin titles of Duke of Cornwall and Duke of Rothesay. The latter title

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<sup>75</sup> Norden, J., *A Topographic Historical Description of Cornwall* (1728)

<sup>76</sup> *The Prince's Case* (1606) (8 Rep 1) (8 Coke Reports 1a) p 499

being that of the male heirs to the throne of Scotland. Henry was granted livery of the Duchy of Cornwall on 1<sup>st</sup> September 1610. The Prince's Council was recreated in 1611. This caused problems since the Duchy had been in the Crown for so long officials were resistant to change and wished to maintain the *status quo*. They were not inclined to surrender their offices to the Prince's Council whose focus was to increase the income to the Duchy both from the Stannaries and from rents. The Prince's Council was also concerned with the Prince's estates forming part of the Earldom of Chester and Principality of Wales.

James I, like his predecessors and successors, was short of money. In contrast to Elizabeth he had a family to support and was generous, even extravagant, with his favourites. During the sixteenth century crown lands had been sold as a short term expedient to generate additional funds so the sources of income to the King had reduced. Finally the cost of Government had increased. Obtaining the optimum returns from the possessions of the heir to the throne was important. The tension which arose from the need of James I and his son to acquire funds was, of course, one of the factors which led to the Civil War.

Prince Henry died on 6<sup>th</sup> November 1612 at which time Charles, Duke of York, became heir to the throne. James I faced a situation similar to that faced by Henry VII who had arranged an Act of Parliament by which Prince Henry (the future Henry VIII) was created Duke of Cornwall. James I dealt with the situation differently. He sought a legal opinion from Sir John Davies<sup>77</sup> which concluded the Charter had intended that the Duke of Cornwall should always be the eldest *living* son being heir to the throne of the King of England as opposed to the eldest son.<sup>78</sup> On the basis of that opinion on 21<sup>st</sup> June 1615, James I issued a Charter granting the Duchy of Cornwall to Prince Charles.

During the Dukedom of the future Charles I there are interesting precursors of issues which were to arise in the 19<sup>th</sup> Century when tension arose between the prerogatives of the Dukedom and of the Crown. There was a disagreement in 1619 regarding the jurisdiction over wards. The dispute was eventually settled after a compromise was

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<sup>77</sup> His authorship was confirmed by George Moore, *Essay on the rights of the Prince of Wales relative to the Duchy of Cornwall* (1795) p 23

<sup>78</sup> *Duchy of Cornwall Case* (1613) (1 Ves Sen 292)

reached. Articles of Agreement were drawn up which are reproduced in Appendix F. It was established, in a policy which continues to the present day, that disputes between the Crown and Duchy should be settled by informal discussion without “suit of law”. The wording contained within the Agreement is as follows:

“LASTLY it is thought meete and Conveyent that if any question shall here after arise between the Master of the Courte of Wards and other of the Consell of the said Court for the tyme being and the Chauncellor to his Hignes and other the Commissioners of His Hignes likewise for the tyme being concerning/ tenures or any incidents or dependancies therevpon *then the same shall first be debated and discussed between the said Officers respectively (and if it may be) determined without suite in lawe.*”<sup>79</sup> (emphasis added)

Although the Duchy, always the pragmatist, was prepared to surrender its prerogatives to the Crown if a price could be agreed<sup>80</sup>.

Both the King and Duke had escheators who frequently quarrelled over the full extent of the Duchy’s rights to escheat. Again a policy was agreed which is similar to that adopted in the 19<sup>th</sup> Century when guidance was provided to the two officials agreeing that profits from land held jointly between the King and Duke should be shared between the two of them<sup>81</sup>.

Whatever his other faults it is generally granted Charles was a successful Duke of Cornwall. Indeed some argue that he got in trouble when he became King because he thought he could rule as he had governed the Duchy. Which is to say with relatively few constraints on his actions.

Prince Charles, (later Charles II) was born in 1630. He was granted livery of the Duchy on 13<sup>th</sup> January 1645 at which time his father was embroiled in the Civil War. Charles I was beheaded in 1649. Parliament had assumed control of the Duchy in 1646. Clearly with the abolition of the Monarchy the Duchy served no purpose. It was surveyed and

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<sup>79</sup> Copy held in Cornwall Record Office transcript prepared by Duchy Archivist accompanying a letter dated 24<sup>th</sup> February 1988 from solicitor to Duchy to Crown Estate

<sup>80</sup> Haslam, G., “Jacobean Phoenix the Duchy of Cornwall in the principates of Henry Frederick and Charles” in Hoyle, R.W., *The Estates of the English Crown 1558-1640* op. cit. p 281/2

<sup>81</sup> Duchy Office MS Folio Volume Escheator and Feodary f. 4 23rd November 1627 “*Order of the Commissioners of the Duchy of Cornwall*”

was slowly sold during the period of the Commonwealth. Upon the restoration of the Monarchy in 1660 Charles II set about reconstructing the Duchy. Those who had bought estates were offered leases in exchange for absolute title. A Council to manage the Duchy was not re-established.

The management of the Duchy remained unchanged during the remainder of the Stuart dynasty. However an issue arose which continues to be a matter of debate. The first Act of Parliament relating to the Civil List was the Civil List Act 1697. This provided that William III was allowed to receive certain specific rents and taxes, from the Hereditary Revenues of the Crown amounting to £700,000 per annum. The Hereditary Revenues were taken to include “The Revenue of the Duchy of Cornwall and any other Revenue arising by rent of Lands in England or Wales..”<sup>82</sup> At this time revenues of the Duchy amounted to £9000 per annum<sup>83</sup>. The “Civil List” was intended to indicate the expenses incurred in operating the *civil* side of Government, maintaining the Royal Household and royal lifestyle. These new arrangements produced “a distinction, financially and politically between King and state.”<sup>84</sup>

By the Taxation etc Act 1702 Queen Anne also surrendered the Hereditary Revenues including the income from the Duchy of Cornwall which was “paid to the Exchequer and assigned to the Sovereign.”<sup>85</sup> The Crown Lands Act 1702 was passed which forbade the Queen and her successors from selling Crown Land. The significance of this Act will become obvious later during an examination of the Crown Private Estate Acts.

### *G 1714 – 1837 - The Hanoverians*

Under the Hanoverian dynasty “the Duchy ambled on according to its old-established order.”<sup>86</sup> A Prince’s Council was reconstituted in 1715 which, apart from a period between 1749 and 1783, became a permanent body. There is no evidence that any of the Dukes of this period visited Cornwall or showed any great interest in the Duchy. Cornwall continued to be over-represented in the House of Commons and because of the

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<sup>82</sup> Civil List Act 1697 section xi

<sup>83</sup> TNA 160/632 – Royal Family Civil List in relation to the hereditary and temporary revenues of the Crown (1936)

<sup>84</sup> Hall, P., *Royal Fortune* (1992) 1992 p 5

<sup>85</sup> TNA T 160/632 op. cit.

<sup>86</sup> Rowse A. L., *The Little Land of Cornwall* (1986) p 53

Duke's patronage over who served in Westminster for particular seats he could exercise power in Parliament. Cornwall's "rotten boroughs" were only swept away with the Reform Act 1832 which reduced the number of Cornish M.P.s to twelve.

Unlike their Stuart predecessors the revenues of the Duchy of Cornwall were not surrendered with the other Hereditary Revenues by the Hanoverian Kings. The reasons for this change are not clear. On George III becoming King in 1760 he relinquished the Hereditary Revenues of the Crown, with the exception of the revenues of the Duchies of Lancaster and Cornwall and of the Principality of Scotland<sup>87</sup>, which, according to Haslam, left the Duchy of Cornwall in an "isolated constitutional niche"<sup>88</sup>. The Hereditary Revenues would be paid into an "Aggregate Fund" and from this fund the King would receive a fixed sum of £800,000 and any surplus arising would accrue to Parliament. The Civil List of George III is the first which took on the modern form of the Civil List. The King remained responsible for civil government expenditure.

The Land Tax Act 1798 was passed to help generate revenue to pay for the Napoleonic Wars and specifically allowed the Duchy to sell land and apply the proceeds to the purchase of government stock for the redemption of the tax. Following the Act the Accessional Manors of Helston in Kerrier, Tywarnhaile, Tybesta, Calstock, Moresk and Tewington were sold although the Duchy reserved the right of all mines and minerals and the liberty of working them<sup>89</sup>.

The Crown Private Estates Act was passed in 1800. This enabled the King to make a will and own landed property privately. Previously any land he bought would become Crown Lands and any profits would be placed in Government hands under the 1760 arrangements. They could not be sold because of the Crown Lands Act 1702. Since the Monarch could not make a will any lands would become merged with Crown Lands on the Sovereign's death. The Act of 1800 was to allow the King to become a private person in the sphere of ownership as well as a public person who was head of government<sup>90</sup>. This and subsequent legislation will be examined in more detail later.

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<sup>87</sup> TNA T 38/837 - Civil List Notes The Welby Papers (1897)

<sup>88</sup> Haslam, G., "Modernisation" in Gill, C., (Ed.) *The Duchy of Cornwall op. cit.* p 48

<sup>89</sup> Concanen, G., *A Report of a Trial at Bar Rowe v Brenton* (1830) Introduction

<sup>90</sup> Hall, *op. cit.* p 9

There were a number of significant court cases during the Hanoverian period which considered the position of the Duchy. The first of these is *The Attorney General v The Mayor and Commonalty of the Borough of Plymouth* (1754) (The Sutton Pool Case)<sup>91</sup>.

The litigation concerned certain leases granted by the Crown in Sutton Pool<sup>92</sup>. Because of the death of one of the defendants and then the death of Frederick, Prince of Wales in 1751 there had been significant delays. The defendants claimed that the King had no right to pursue the case since “His Majesty does not appear by the said information or bill, to derive any right or interest from his said late Royal Highness...” They asked for the legal action to be dismissed and for their costs. It was heard before Sir Thomas Parker, Lord Chief Baron; and the Barons Legge, Smythe and Adams. By the time it came for final judgement it had been before the courts for nine years.

Baron Adams stated:

“First it is not disputed but that this is part of the Duchy of Cornwall (*the property subject to the dispute being leases of part of Sutton Pool*) and, as such, part of the inheritance of the Crown.”

“So that when the Prince of Wales takes *he takes an estate in fee simple* (emphasis added)...he takes an estate of inheritance, as the eldest son and heir apparent of the Crown....”

Baron Legge said in his decision:

“..As to his (the Duke of Cornwall) being in possession of it as a Royal Prerogative, *I do not know that the Prince of Wales, in any instance, differs from other subjects; though he is the greatest of subjects, he is still only a subject;* (emphasis added). It would be an extraordinary thing to say, that the Act has thrown an estate upon the Prince, *the most extraordinary fee that ever was created* (emphasis added) and has made it continue inseparably annexed to the Crown, and indissoluble by any legal means; and at the same time to say, that they have still left it to be separated by wrong..”

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<sup>91</sup> *The Attorney General to HRH Prince of Wales, Duke of Cornwall v The Mayor and Commonalty of the Borough of Plymouth* (1754) (Wight 134)

<sup>92</sup> Inlet in Plymouth Sound

The lawsuit confirmed that the Duchy is an extraordinary estate created by an Act of Parliament no matter how “dissonant it may be to the rules of law”. It is part of the “inheritance of the Crown” and is “indissoluble by any legal means”. It also confirmed the Prince of Wales is a subject, “though the greatest of subjects he is still only a subject”.

The next case is *The Attorney General to HRH Prince of Wales Duke of Cornwall v Sir John St Aubyn and others* (1811)<sup>93</sup>. (“*The St Aubyn Case*”) The litigation concerned property on the River Tamar. The defendants were receiving rent on land between the high and low water marks and they were asked to provide details of the estates and evidence they had title. More particularly the Court was asked whether the Duke of Cornwall could act through his Attorney General, a prerogative right normally only available to the Crown.

Baron Graham said:

“..That the Prince’s Attorney General of his Dutchy of Cornwall is a public officer, well known to the constitution, and empowered to act for the Prince, as his public officer in suits of general description of those, which are allowed to be brought by the Prince of Wales, I will not waste time to discuss. The Prince of Wales has his Attorney General of the Dutchy of Cornwall on a footing not very different from that of the King’s Attorney General..”

“..that the Prince of Wales stands as to these possessions, precisely in the same situation that the King himself does; and that they are as entire, and as much protected, when they are in the possession of the Prince, as when they are in the possession of the Crown and that for the necessary purpose of preserving their integrity...”

“....that this privilege exists for the protection of the Crown Lands; the Dutchy Lands are part of them, as a member of the Royal Establishment: *The Crown has at all times an interest in them*: There is the same expediency, and use of the prerogative to protect them, when the Prince has them, as when the King has them..” (emphasis added)

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<sup>93</sup> *The Attorney General to H.R.H. Prince of Wales, Duke of Cornwall v Sir John St Aubyn and others* (1811) (Wight 167)

Chief Baron MacDonald supported the view of Baron Legge and went on to say:

“The court, I conceive, must in that case (*the Sutton Pool Case*) have considered the singular limitations under which the property in question is holden, to have given an interest to the King and the Prince, so blended and incorporated, that the suit of the one, is so far the suit of the other, as to be analogous to an interest derived by the one from the other..”

Baron Wood noted “...the peculiar nature of the limitation of the Duchy of Cornwall..” In simple terms the judges decided that while the Duchy properties were in the hands of the Duke of Cornwall they were entitled to the same protection, and same provisions, in effect, as while the Duchy was in the Crown.

As a kind of Appendix to the *St Aubyn Case* the matter was referred to the House of Lords<sup>94</sup> who were asked a number of questions including:

“Whether the Right of the Prince, as Duke of Cornwall to sue and be sued in the Court of Exchequer touching the Title and Inheritance of the Duchy of Cornwall by his Attorney General for such purpose, is given to the Prince by force of any and what words contained in the original Grant of the Duchy by King Edward III...”

Unfortunately it would appear from the records of the House of Lords “Consideration was put off”<sup>95</sup> and the questions never answered.

*Rowe v Brenton* (1828)<sup>96</sup> was heard in the Court of Kings Bench and was primarily concerned with the rights of the conventional tenants within the Accessionable Manors of the Duchy.

The Duchy did not wish for the admission of a document which it sought to demonstrate was “private” and therefore should not be available to the Court. The record to which the Duchy objected was produced by James de Wodestoke and William de Monden of the King’s Remembrancer’s Office. and was called *Capacio Seisine Ducatus Cornubie* (“The Caption of Seisin of the Duchy of Cornwall”) and dated 1337. The Duchy objected that the Caption was not a “public document”. The Duke of Cornwall, the Duchy said was

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<sup>94</sup> HL/PO/JO/10/8/482 25 June 1819 – 6 July 1819

<sup>95</sup> E Mail from Parliamentary Archives dated 23 March 2012 reference p 756a 1819 Parliamentary Session.

<sup>96</sup> *Rowe v Brenton* (1828) (8 B & C 737), (3 Man & Ry KB 133), (108 ER 1217), (Concanen’s Rep 1)



merely a subject, although the highest subject in the Kingdom, and that the public had no interest in his acts or in the revenues of the Dukedom.

Lord Tenterden, C.J. while accepting the proposition that the document could not be used in evidence if it was merely private said:

“I think the foundation of the objection entirely fails – the objection is put upon the ground, that this is a private document – *that the Duke of Cornwall can be considered only like any other of his Majesty’s subjects bating only his high rank.*(emphasis added) But with regard to the Duchy of Cornwall, I am clearly of the opinion that the Duchy of Cornwall, when there is no Duke of Cornwall belongs to the Crown:- it is sometimes in the hands of the Crown, and sometimes in the hands of the Duke; *and the Crown, therefore, or in other words, the public,*(emphasis added) has an interest in every thing which is done in the Duchy: and it appears to me perfectly immaterial, whether the act done, is done under the authority of the King, or under the authority of the Duke, when there is a Duke, for in all these matters the interest of the Crown is equally concerned.”

Lord Tenterden went on to say:

“The estate of the Duchy of Cornwall is one of *a very peculiar nature*; (emphasis added) there is nothing like it existing in this country: To say one rule shall prevail.....when the Duchy is in the hands of the Duke and that another shall prevail when the Duchy is in the hands of the King would be accompanied by great confusion and great injustice...whether the Duchy is vested in the Crown, or in the Duke, the Crown has a peculiar interest in it at all times...and whatever is done during the existence of a Duke, is to be considered in the same manner, as if it was done to the Crown.”

*Rowe v Brenton* demonstrates a characteristic of the Duchy which would become ever clearer as time passed. When convenient, the Duke and the Duchy are private with the public having no right to enquire. However, at other times the Duchy is part of the Crown and enjoys the prerogatives which that status brings.

It is noteworthy a Select Committee was appointed in 1800 to “Inquire Into the State of the Public Records of the Kingdom” which reported, as far as can be seen, for much of

the first half of the nineteenth century<sup>97</sup>. The Report lists as one of the Offices of State the Duchy of Cornwall whose records, by necessary implication, are Public Records. This contrasts with the contemporary situation.

## *H The Stannaries*

There is a chapter devoted entirely to the Stannaries therefore, to avoid duplication, little has been said about them in this section of the work. Suffice at this stage to say the Duchy continued, during this period to control the Stannaries. That meant it collected the tin tax or “Coinage” from the production of tin, it remained responsible for the Stannary Court systems in Devon and Cornwall from which there was no appeal to the “ordinary” Courts but only to the Prince’s Council. It also meant the Duchy could summon Convocations of the Tinnars of Cornwall and Devon (Tinnars Parliaments) which met on a number of occasions during the period under consideration.

## *I Conclusion*

On Victoria ascending to the throne in 1837 the Duchy was in a sorry state shackled:

“...by archaic laws and by two indifferent kings, George IV and William IV it was again threatened with continued neglect.”<sup>98</sup>

It was associated with rotten boroughs and its income had remained static. Once again it was “near the precipice of oblivion”.<sup>99</sup> The Duchy was increasingly perceived “as the symbol of a feudal past, an out-of-date brake on progress”.<sup>100</sup>

Stannary administration and Courts continued to be the responsibility of the Duchy. The Prince’s Council, first created by Edward the Black Prince, became a permanent feature. The Stuarts’ procedure for resolving contentious matters without resorting to litigation became, and continues to be, embedded policy.

*Chasyn v Lord Sturton* and the *Prince’s Case* confirm the county of Cornwall “should always remain as a Duchy”. Both cases establish that the Great Charter of Creation was an Act of Parliament, Lord Coke explaining it could not be other because the King could

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<sup>97</sup> House of Commons – *Reports from the Select Committee Appointed to Inquire Into the State of The Public Records of the Kingdom*, 1800 HC1 p23

<sup>98</sup> Haslam, G., “Evolution” in Gill, C., (Ed.) *The Duchy of Cornwall* op. cit p 46

<sup>99</sup> Haslam, G., “Modernisation” in Gill, C., (Ed.) *The Duchy of Cornwall* op. cit. p50

<sup>100</sup> Burnett, D., *A Royal Duchy A Portrait of the Duchy of Cornwall* (1996) p 31

not by prerogative create such a “mode of descent unknown to common law” or create an estate in land which “should cease and revive” in the way the Duchy does. Furthermore the land annexed to the Duchy by Act of Parliament could only be severed by Act of Parliament. The *Sutton Pool* litigation and the subsequent lawsuits of *St Aubyn* and *Rowe v Brenton* raise still unresolved questions. They are clear that the Prince of Wales, even as Duke of Cornwall, is a subject of the Crown albeit the greatest subject. Duchy lands are Crown Lands and the public has an interest “in everything that is done in the Duchy”. The Duchy is a shifting possession. For only eight years between 1376 and 1714 was there a Duke of full age. In other words the Duchy was more often in the Crown than with a Duke during the period under consideration.

Because the land was annexed to the Duchy by Act of Parliament and could only be severed from the Duchy by Act of Parliament this would imply that even if, in the hands of some other “private estate” owner, the land which would otherwise be forfeit by virtue of oversight or mistake that would not be the case with the Duchy.

More than anything else, however, despite the ambiguity surrounding its status and the sorry state the Duchy was in when Victoria came to the throne it had survived. It had endured the deprivations of Richard II, the indifference of Elizabeth I and its abolition by the Commonwealth. Furthermore it had undergone a transition and although it retained many features of Government, it no longer represented the government of a part of England. Its continuance may have been the consequence of indifference and the fact it was a useful tool too valuable to be abolished. In common with the Duchy of Lancaster it was a source of income to the Crown thus providing some continuing independence.

## Chapter 4

### The Duchy of Cornwall

#### From Queen Victoria to Prince Charles

1837 – To date

***“The fundamental principle to which you have to hold fast is that the Duchy is altogether a private affair with which neither the Government nor its ministers have, or ought to have, anything to do.”<sup>1</sup>***

#### A Introduction

It was observed in the previous Chapter that when Queen Victoria came to the throne the Duchy of Cornwall was in a sorry state; in fact it “was near to the precipice of oblivion”<sup>2</sup>. In an era of economic expansion its income was stagnating. However, just over a quarter of a century later it had transformed itself into an “essentially commercial organisation.. (managing)...the Duke’s land holdings in Cornwall and elsewhere”<sup>3</sup>. It had, following the passing of the Duchies of Lancaster and Cornwall (Accounts) Act 1838, become a “publicly accountable private estate”<sup>4</sup>. Despite that, Sir John Romilly, Solicitor General, in 1850 in arguing that a Committee of Inquiry into the Duchy should not be granted asserted “....this property is absolutely private..” and later:

“..the property in question was absolutely private property and managed for a private individual albeit one of exalted position; and because the fact of accounts being laid before the Treasury and Parliament did not take it out of the category of private property.”<sup>5</sup>

The Duchy claimed, and continues to claim, to be part of the Crown and to enjoy the privileges associated with that position. At other times the Duchy has insisted it was distinct from the Crown and made claims against the Crown on the basis of privileges previously granted by the Crown to the Duchy.

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<sup>1</sup> A letter from Baron Stockmar to Prince Albert cited in Burnett, D., *A Royal Duchy* (1996) 1996 p 31

<sup>2</sup> Haslam, G., “Modernisation” in Gill, C., (Ed.) *The Duchy of Cornwall* (1987) p50

<sup>3</sup> Payton, P., *Cornwall A History* (2004) p 78

<sup>4</sup> Halsam op. cit. p 52

<sup>5</sup> HC Debate 25 March 1850 vol 109 cc 1370-1389

During the period we shall now consider, the Duchy succeeded in transforming itself into an organisation which, although it had inherited valuable rights and privileges, had become a commercial business concerned to protect its capital and maximise its income. This Chapter will explore the various disputes which occurred between the Crown and the Duchy and the way in which they were resolved. One reason for this examination is to demonstrate that many of the claims made by and on behalf of the Duchy in regard to its constitutional status and privileges are based not on statute or judicial decision but on contradictory and unsatisfactory decisions of “arbitrators”. The process by which in 1837 the Duchy of Cornwall was an Office of State whose records were “public records”<sup>6</sup> but by 2011 had become a “private estate” whose archive is no longer part of the “public records” and is generally not accessible will be described; whilst at the same time being in the position of giving consent to legislation and enjoying Crown Immunity which allows it to have a privileged tax status.

In addition some of the claims made about the status of Cornwall and its relationship with the Duchy and the English state will be challenged since, it will be argued, they are based on inaccurate premises.

### *B The Accession of Queen Victoria*

When Queen Victoria came to the throne in 1837 the Duchy’s finances were in a parlous state. Over 170 years later the Duchy survives and is in a more robust condition than it has ever been. How did this evolution occur? Largely because of that remarkable man, Prince Albert, who put in place the foundations upon which the Duchy of Cornwall is based.

A Chapter is devoted to Duchy finances, therefore, the position in detail will not be considered now. Suffice to say the finances of the Duchy were in an uncertain condition and came under scrutiny. William IV had claimed the income from the Duchies of Lancaster and Cornwall were: “The only remaining pittance of an independent possession (which had been) enjoyed by his ancestors during many centuries as their private and

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<sup>6</sup> House of Commons, *General Report to the King in Council from the Honourable Board of Commissioners on the Public Records*, 1837 HC60

independent estate.”<sup>7</sup> Sir George Harrison, wrote a lengthy Memoir in defence of the *status quo* in which he gave as his opinion that the King was; “..duty bound to maintain the Duchies and transmit them unimpaired to his successors” and the Sovereign held the Duchy of Cornwall; “...as a sacred trust vested in the Sovereign personally to preserve and maintain the Duchy in all its pristine integrity.”<sup>8</sup> Harrison went further and suggested the Sovereign, with regard to the Duchy of Cornwall, was invested with the character of a trustee. Indeed the principle “*Delegatus potestas non potest delegari*”<sup>9</sup> applied and therefore; “The Sovereign trustee could in fact, if not in theory, do wrong if he bargained away the Duchy of Cornwall.” Interestingly Harrison also said:

“In regard to this Duchy of Cornwall the constitutional and responsible adviser of the Sovereign will be her Prime Minister.”<sup>10</sup>

Notwithstanding the robust defence mounted by Harrison and others the new Queen clearly considered it to be politic to concede some ground. Since Victoria had not succeeded to the private property of William IV nor to the revenues of Hanover<sup>11</sup> the then Chancellor of the Exchequer, Mr. Spring Rice, reasoned she should not be asked to surrender the Duchies of Lancaster or Cornwall<sup>12</sup>. However, he proposed and it was agreed, annual reports on the Duchies should be submitted to Parliament. Thus we see the passing of the Duchies of Lancaster and Cornwall (Accounts) Act 1838, subsequently amended by the Duchy of Cornwall Management Act 1982, by which accounts of the Duchies have to be presented to Parliament for scrutiny. In the past the Duchies had been preserved from examination on the grounds they were the “sovereign’s private property”. Once accounts had to be submitted they could no longer be regarded as purely private. Haslam explains that the Act meant the Duchy was:

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<sup>7</sup> Percival G., “The Civil List and the Hereditary Revenues of the Crown” (1901) *Fortnightly Review* p 7

<sup>8</sup> Harrison, Sir George *Memoir respecting the Hereditary Revenues of the Crown and the Revenues of the Duchies of Cornwall and Lancaster* (1838) p 12

<sup>9</sup> A delegate may not delegate

<sup>10</sup> Harrison, op. cit. p 9

<sup>11</sup> Victoria could not become Elector of Hanover because of the operation of Salic Law which prevented females inheriting thrones or fiefs.

<sup>12</sup> Kuhn, W.M., “Queen Victoria’s Civil List” (1993) *The Historical Journal* Vol 36 no 3 p 652

“Not exactly a private company, nor a government department, the Duchy became a publicly accountable private estate, a paradoxical solution not untypical of the British constitution.”<sup>13</sup>

The same year saw the passing of the Coinage Abolition Act 1838 (also called the Tin Duties Act 1838) which provided for coinage duty to be abolished in exchange for an annuity to be paid to the Duchy of £16,216 15s 0d (equivalent to approximately £1.1 million in today’s money) The amount remained unchanged until the annuity was abolished by the Miscellaneous Financial Provisions Act 1983.

In 1843 the Queen asked if the obligation to provide accounts applied now that there was a Duke of Cornwall (the future Edward VII was born in 1841). The matter was referred to the Attorney and Solicitor General who advised:

“We are of the opinion that the obligation to render accounts of the Duchy of Cornwall...still continues..notwithstanding the property is now vested in the Prince of Wales.”<sup>14</sup>

In 1842 Sir Robert Peel persuaded the Queen to pay, voluntarily, the reintroduced income tax on her Civil List which she agreed to do and she continued to pay until her death fifty nine years later. Since she enjoyed Crown Immunity she was not obliged to pay.

The Duchy paid taxes including property tax, land tax and “other taxes” also from 1842<sup>15</sup>.

Prince Albert was made one of the Commissioners on an enquiry set up to examine the Duchy. He attended his first meeting of the Council of the Duchy in 1840 and was appointed Lord Warden of the Stannary in 1842 which role he fulfilled until his death in 1861. It is the only official position which Albert ever occupied which may explain why he took such an intense interest in Duchy matters. The tone of his stewardship of the Duchy is suggested in correspondence sent in 1843 at his direction in connection with a dispute which arose over the Waters of the Tamar. The Duchy wrote:

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<sup>13</sup> Haslam, op. cit. p 52

<sup>14</sup> TNA TS 25/40 - Duchy of Cornwall Accounts: Whether obligation to render accounts applies as property now vested in Prince of Wales (1843)

<sup>15</sup> TNA T 38/837 – Civil List Notes (1897)

“During the Reign of George IV a statement with reference to these rights was by His Majesty’s command addressed to the Lords of the Treasury with a view to obtaining compensation for the possessor of the Duchy of Cornwall. And His Majesty was graciously pleased at that time to communicate to the Government and Officers of the Duchy that His Majesty was fully aware of the necessity of supporting the rights and privileges of the Duchy of Cornwall, and that on no occasion would *His Majesty be disposed to yield those rights in the Crown without an adequate compensation under the sanction of Parliament.*” (emphasis added)

Later in the same correspondence:

“In consequence of the magnitude and importance of these claims, the (Duchy) Council are desirous that the attention of the Lords of the Treasury should be called to the subject at as early a period as possible, in order that their Lordships may consider what steps ought to be taken with a view to compensate the Prince of Wales, and at the same time *to prevent the great public inconvenience which must necessarily arise from the conflicting interests of the Crown and Duchy of Cornwall..*”<sup>16</sup> (emphasis added)

This correspondence serves as a summary of themes which have already been highlighted in the previous Chapter, reflected in the Agreement of 1620, to which we will return.

### The Waters of the Tamar

The dispute between the Duchy and the Crown regarding the Tamar was maintained for several years. (There is correspondence on the topic continuing until 1933.) The Duchy it was said was “jealous and persistent in its claims”<sup>17</sup>. In a procedure repeated many times the question was submitted in 1861 for arbitration. In this case to Mr Edward Smirke who was Vice Warden of the Stannaries. His decision did not determine the matter. The Office of Woods wrote to the Lords of Treasury they were anxious to resolve the problem because:

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<sup>16</sup> TNA TS 45/5 - Duchy of Cornwall Rights in water of River Tamar (1822 – 1880)

<sup>17</sup> TNA CRES 37/990 - Cornwall Water of the Tamar Arbitration relating to the title between the Crown and the Duchy of Cornwall (1914 – 1938)



“At the same time my Lords are desirous to prevent in future the long and expensive litigation to which a further agitation of the rights of the Duchy would give rise.”<sup>18</sup>

They went on to say:

“My Lords wish to observe in conclusion that Her Majesty’s Government has a strong interest in supporting the just rights of the Duchy of Cornwall, and that it will be the desire, and it is the duty of this Board to prevent, as far as possible, the incurrence of unnecessary expense in the settlement of adverse claims between the Duchy and the Crown, but they must remark that the interests of the public, and of individuals must often be involved in the settlement of undefined rights, and that, with every disposition to approach these questions in a conciliatory spirit *they are unable to accept the proposition to which the recent application of the (Princes) Council would seem to point, that claims, in respect of boundaries, adverse to them should be accepted without evidence or legal Arbitrament.*”  
(emphasis added)

The desire to avoid litigation was a powerful motivation to agree to arbitration to decide disputes. In the same file of correspondence a letter was written by the Duchy on 6<sup>th</sup> May 1864 in which it referred to the enquiry undertaken by Mr Smirke. The letter said:

“The question arose from the Officers of the Crown claiming a considerable portion of Plymouth Sound..... The Officers of the Prince of Wales felt fully satisfied that there was no substantial ground for the claim but as it was pressed on the part of the Officers of the Crown it was arranged by mutual consent that the matter should be referred to the arbitration of Mr Smirke....

The claim put forward by the Crown involved as must always be the case when a question is raised as to the ancient rights of the Duchy of Cornwall the nature and extent of which are generally very imperfectly understood, a very laborious enquiry and examination of ancient records and documents on the part of the Duchy extending over 500 years....”

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<sup>18</sup> TNA CRES 58/694 - Water of Tamar: arbitration between the Crown and the Duchy of Cornwall. Water of Tamar: arbitration between the Crown and the Duchy of Cornwall DEVON The Crown Estate Office and predecessors: Foreshores, Registered Files (County Series) (1845 -1889)

The Duchy then continues by saying in effect that since an enquiry was:

“...forced upon the Duchy after strong remonstrance and every endeavour...unfortunately unsuccessful to convince the Crown of the erroneous nature of the claims. The Duchy feels strongly that the Revenues of His Royal Highness should not be charged with any portion of the payments to the arbitrator.”<sup>19</sup>

An interesting insight into the opinion of the Duchy of itself is revealed in still more correspondence regarding the Waters of the Tamar, this time in the 1890's. On 13<sup>th</sup> April 1894 in a letter to the Board of Trade the Duchy wrote; “...with a view to assisting the Board of Trade *the Department* (emphasis added) will be prepared...” In a further letter dated 21 April 1894 the Duchy wrote; “...but it would be of considerable assistance *to this Department* (emphasis added)...” A “private estate” which regards itself as a Department of State is an interesting proposition.

The issues which arise from the above correspondence exemplify the attitude of the Duchy which continues. First the Duchy's persistence in its assertion of its rights and its insistence on being compensated before surrendering them. Next the tension which arises from claiming to be part of the Crown and, therefore, entitled to their privileges while demanding rights in conflict with the Crown. There is also the “need” to resolve differences in a way that avoids “public inconvenience” which would otherwise arise. A policy which, as we have noted, developed in the seventeenth century.

A striking feature of the disputes which arose was the Duchy's assumption that the position they put forward and the legal arguments they deployed were so obviously correct no contrary position could possibly be sustained. Further examples will be provided shortly. With regard to the Waters of the Tamar the Duchy resisted paying for the arbitrator since the cost had been forced on them because of the “erroneous nature” of the claims of the Crown. The Crown had, it will be noted, refused to accept Duchy claims “without evidence or legal Arbitrament.”

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<sup>19</sup> TNA MT 10/927 – Board of Trade Harbour Dept Correspondence 1904

### Duchy of Cornwall Acts 1844

In 1844 Prince Albert managed to secure the passing of two Acts of Parliament which allowed the Duchy freedom to take advantage of developing trends in agriculture and to update its outmoded system of land tenure. The first of these statutes was the Duchy of Cornwall Act 1844 which enabled the Council of the Duchy of Cornwall to “sell and exchange lands and enfranchise copyholds”<sup>20</sup>. The Prince’s Case had established that no Duke of Cornwall had authority to bind his successor, thus successive Acts of Parliament were passed to give Dukes of Cornwall powers to grant leases that would bind succeeding Dukes. The 1844 Act gave a more convenient general power.

A further statute was passed in the same year: the Duchy of Cornwall (No 2) Act 1844 which was to “confirm and enfranchise the Estates of the Conventional Tenants of the Ancient Accessionable Manors of the Duchy of Cornwall”<sup>21</sup>.

### The right of the Duchy to appoint the Coroner for Cornwall

During the course of the case, *Jewison v Dyson* (1842), which primarily concerned the Duchy of Lancaster and its right to appoint a local Coroner<sup>22</sup>, the Court had things to say about the Duchy of Cornwall as follows:

“The Duchy of Cornwall is, indeed, a very peculiar tenure.....He (the Duke of Cornwall) alone can enjoy it, and the moment he becomes king it ceases, and is absorbed in the Crown. What then is the consequence of that? The necessary consequence is, that in the Duchy of Cornwall, whenever the duchy ceases to exist, being absorbed in the Crown, the appointments of coroners are made in the same way as the appointments in any other county, by the freeholders; and if afterwards a different authority should intervene by the birth of a Prince of Wales, he cannot interfere with such existing appointments; he has no power to divest an existing officer, but only to appoint to those offices when they become vacant.

In the case of the Duchy of Cornwall it is almost incredible how the documents belonging to that Court were scattered about: a great many are in the Court of Exchequer; a great many in the Tower of London; and *certainly till a very recent*

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<sup>20</sup> Duchy of Cornwall Act 1844 Introduction

<sup>21</sup> Duchy of Cornwall (No 2) Act 1844 Introduction

<sup>22</sup> *Jewison v Dyson* (1842) (9 Meeson and Welsby 540) p 589

*period, the accession of King George IV, the records of the Duchy of Cornwall were never kept in a proper place and condition.” (emphasis added)*

As far as can be established the Duke of Cornwall has never appointed the Coroner for Cornwall although the case would suggest they had the power to do so if a vacancy arose<sup>23</sup>. It would also appear even 160 years ago or so the Duchy records presented a problem.

“The consent of the Duchy of Cornwall signified”

The first time, as far as can be established with the help of the Parliamentary Archives, when the Duke of Cornwall’s consent was signified to a Bill was for “The West of England and South Wales Drainage Company Incorporation Bill” 1<sup>st</sup> August 1848 to 10<sup>th</sup> August 1848<sup>24</sup>. His consent would have been given by his mother, Queen Victoria, on the Duke’s behalf since he was only seven years old at the time. This is comparatively late in Parliamentary history and it has not been possible to establish, despite much effort, why the process began. The House of Commons Archive advised that they: “..cannot find any items that may obviously explain...the Duchy consents.”<sup>25</sup> Of course the *assent* of the Sovereign is always required to Acts of Parliament. However the Sovereign’s consent is specifically required with regard to Bills affecting the prerogative, being the “Hereditary Revenues, personal property or interests of the Crown and the Duchy of Lancaster”. However, the giving of consent by the Duchy of Cornwall has become a matter of Parliamentary usage almost by default without any investigation of the basis on which that consent is required. The House of Commons Information Office explained that Erskine May 23<sup>rd</sup> Edition stated:

“Bills affecting the prerogative (being powers exercisable by the Sovereign for the performance of constitutional duties on the one hand, or hereditary revenues, personal property or interests of the Crown, the Duchy of Lancaster or the Duchy of Cornwall on the other) require the signification of the Queen’s consent in both

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<sup>23</sup> The Attorney General to H.R.H. the Prince of Wales in a letter to the writer 24<sup>th</sup> October 2011 has confirmed the records do not indicate the Duke ever appointed a Coroner for Cornwall.

<sup>24</sup> Lords Journal lxxx p736, HL/PO/JO/10/8/1692

<sup>25</sup> E Mail to writer from House of Commons Archive 24<sup>th</sup> February 2012

Houses before they are passed. When the Prince of Wales is of age his own consent as Duke is given.”<sup>26</sup>

It is possible that there are occasions earlier than 1848 when the Duke of Cornwall’s consent was required but Hansard only became a full official report from 1909. From 1803 when it started until 1909 it existed in an unofficial form and it focussed on public bills; therefore private bills were not always covered. It is clear, however, that the consent of the Duchy was not signified to the Duchy of Cornwall Acts passed in 1844.

Great importance is attached to the requirement that the Duchy give consent to certain legislation by those arguing for the distinct legal status of Cornwall. For example John Angarrack states the requirement:

“..only touch the surface of this secretive constitutional arrangement.

(it is a) reflection of parliament’s inability to freely legislate in respect of the Duchy of Cornwall.

....the governance and legal identity of Cornwall lie within the jurisdiction of the Duchy of Cornwall, which itself, for many purposes, remain extra-jurisdictional to the UK Parliament.”<sup>27</sup>

The evidence does not support the claims made for it. It is clear the need for the consent dates from the 1840’s and would appear to be based on the Duchy’s desire to protect its economic interests. If the constitutional implications were as suggested it would be reasonable to suppose evidence of the need for Duchy consent would date back much further than 1848.

### The Queen’s Remembrancer’s Fees

There were, at least, two disputes which arose between the Crown and the Duchy of Cornwall during the 1850’s. The first dates from 1855 and relates to the fees claimed by the Queen’s Remembrancer<sup>28</sup> from the Duchy of Cornwall<sup>29</sup>. The fees amounted to £12

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<sup>26</sup> E Mail to writer from House of Commons Information Office 21 April 2011. Since that time Erskine May 24<sup>th</sup> Edition has a different formulation which will be considered in Chapter 9.

<sup>27</sup> [www.duchyofcornwall.eu/latest/](http://www.duchyofcornwall.eu/latest/)

<sup>28</sup> The Queen’s Remembrancer – An ancient judicial post, the oldest judicial appointment in continuous existence, first created in 1154, continued to sit in the Court of Exchequer until the Court was abolished in 1882. Now held by the Senior Master of the Queens Bench Division. The purpose of the role was to keep records of taxes paid and unpaid.

8s 4d (about £600 in today's money) and were in connection with a suit between the Duchy and the Bristol Water Works Company<sup>30</sup>. They arose under the Exchequer Court Act 1842.

The opinion of the Attorney General to the Duchy was obtained. He said:

“...it will be proper to resist the payments of these fees...communication should be made to the Lords of the Treasury that they instruct the Queens Remembrancer to abstain from demanding them.”

The Surveyor to the Duchy wrote to the Treasury, enclosing a copy of the Attorney General to H.R.H. Prince of Wales opinion, which said the view of Prince Albert had been sought who gave as his judgement the fees should not be paid. The letter then continues:

“It will probably occur to the Lords Commissioners that in proceedings of this nature which affect the landed property of the Duchy the Attorney General of His Royal Highness *represents the Interest of the Crown as well as the interests of the Prince.*”(emphasis added)

The Queen's Remembrancer in his response stated:

“..it has been thought necessary to demand these fees..in consequence of the Prince of Wales being a party to the suit as a *subject suing for his own benefit and not in any way to be considered as suing on the part of the Crown or the Public.*”(emphasis added)

He continues:

“..it would seem he (the Prince of Wales) stands in the same predicament as any other suitor not the Crown or a Public Department of Revenue..the Duke of Cornwall may come within the exemptions contained within the Act..the exemption being only intended to apply to the payment of fees of such Public Departments as would only pay them out of public monies. – This could not be held to be the case in regard to fees payable by the Duchy of Cornwall as *private*

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<sup>29</sup> TNA TS 25/829 - Duchy of Cornwall: Payment of fees claimed by the Queen's Remembrancer from the Duchy of Cornwall (1855)

<sup>30</sup> *The Attorney General of the Prince of Wales v The Bristol Waterworks Company* (1855) (156 E.R. 699) (10 Ex. 884)

*party in a cause; and I have therefore been of opinion that these fees were properly demanded.* (emphasis added)

The only possible argument by which I can conceive a claim to exemption to be supported would be founded upon a contingent claim of the Crown to the Revenues of the Duchy of Cornwall in the event of the death of the Prince of Wales; but I should submit that even supposing the exemption to be maintainable on the occurrence of that contingency (which might be doubtful) that possibility could not affect the position of the actual Duke of Cornwall *suing as a subject and liable to the conditions affecting subjects in this court.*” (emphasis added)

The Attorney General to H.R.H. Prince of Wales responded to the Queen’s Remembrancer first by suggesting he was mistaken that the suit against the Bristol Water Works Company was for the benefit of the Prince of Wales “solely and personally” whereas in fact they:

“...were to the benefit of the Lands of the Duchy and thereby to the inheritance of the Crown. The possessions of the Duchy were inseparable from the Crown save for the purpose of supporting the dignity of the Prince of Wales for which purpose they were vested in His Royal Highness as it were temporarily and the claim of the Crown to the Revenues of the Duchy is not merely contingent on the event of the death of the Prince of Wales but the interest of the Crown in those revenues is permanent subject to the contingent claim of His Royal Highness.”

As happened so often the matter was submitted to the Government’s Attorney and Solicitor General who gave their opinion:

“It therefore appears to us incorrect to say that the interest of the Crown in the Revenues is permanent subject to the contingent claim of H R H whenever a Prince of Wales exists. *It appears to us that it is the interest of the Crown that is contingent on the failure of a Prince of Wales.* At all events H R H has a present and immediate interest in the Revenues of the Duchy. He does not sue in the name or on behalf of the Crown but in his own account. The fruits of the suit will enure to his immediate benefit. True it is that the Crown even where there is a Prince has an indirect interest (independently of its Reversionary Interest in the maintenance of the Revenue of the Duchy as forming a provision for the

Prince)...*We are of the opinion therefore that H R H stands in the same position as any other subject or suitor in this Court of Exchequer and is liable to pay the fees in question.*" (emphasis added)

The dispute over the Queen's Remembrancer's Fee illustrates a theme to which attention has already been drawn. When some economic benefit can be gained making claims against the Crown or, alternatively, when that is financially beneficial claiming to be part of the Crown. In this case the Duchy claimed that it should enjoy the same privileges as the Crown.

From 1820 until 1841 there had been no Duke of Cornwall and thus the Duchy had been in the Crown. The issue, of course, is of an estate sometimes being in the Crown and, therefore, presumably enjoying the privileges which accompany that status and at other times in the hands of the Prince of Wales, a subject of the Crown "though he is the greatest of subjects"<sup>31</sup> or, as the Queen's Remembrancer explained, a "private party". Finally the recourse to arbitration rather than litigation. In this matter a robust view was taken and the Duchy claim was denied and the fees paid.

During the course of the correspondence the Duchy of Cornwall did not claim Crown Immunity and the Government Law Officers never suggested it was applicable. There will be further examination of this issue in a later chapter.

### The Cornwall Foreshore Dispute

This indisputably is the most comprehensively documented disagreement arising between the Duchy and the Crown. The full title given in the papers is "The Tidal Estuaries, Foreshores, and Under-Sea Minerals, within and around the coast of the County of Cornwall"<sup>32</sup>. The claims made on behalf of the Duchy such as the Duke of Cornwall was "quasi sovereign within his Duchy", the Crown had "entirely denuded itself of every remnant of Seignory and territorial dominion....within the County or Duchy of Cornwall", "...the Duke did become entitled to the whole county of Cornwall" and "within Cornwall the Duke was quasi sovereign." The Crown challenged the assertions

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<sup>31</sup> *The Attorney General to HRH the Prince of Wales v The Mayor and Commonalty of the Borough of Plymouth* (1754) (Wight 134) p160

<sup>32</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall 1854-56 Arbitration by Sir John Patteson



made by the Duchy. However, the arbitrator, Sir John Patteson, decided in favour of the Duchy and, as a consequence, the Cornwall Submarine Mines Act 1858 was passed. The introduction to that Act is significant. It says:

“An Act to declare and define the respective Rights of Her Majesty and of His Royal Highness the Prince of *Wales* and Duke of *Cornwall* to the Mines and Minerals in or under Land lying below High-water Mark, within and adjacent to the County of *Cornwall*, and for other Purposes.”

The Duchy’s claims were made to secure an economic benefit. The “Mines and Minerals in or under the Land lying below High-Water Mark” at this time had considerable value and it was this the Duchy was anxious to secure. Again a dispute was submitted to arbitration with the arbitrator being asked to choose between the competing claims of the Crown and the Duchy: The latter maintaining it was part of the Crown but at the same time claiming a right against the Crown. The distinction was more apparent than real. The Hereditary Revenues of the Crown had been surrendered in favour of the Civil List. The more that could be clawed back from that which had been surrendered the greater the economic advantage to the Royal Household, whether to the Sovereign or to her eldest living son.

Bernard Deacon is rather dismissive and says:

“In 1855-7 the duchy lawyers were presenting the best legal case they could to gain the right of wrecks<sup>33</sup> in Cornwall....Sometimes the duchy lawyers were just plain wrong..”<sup>34</sup>

He is correct: the Duchy lawyers were doing what lawyers do and presenting their client’s case in the best possible light. Similarly the Crown’s advocates did their best to rebut the Duchy’s case. The arbitrator, Sir John Patteson, a distinguished jurist, decided in favour of the Duchy. It is important to see the case in context. It was one of a number of disputes which the Duchy pursued in some of which they succeeded and sometimes they failed.

Mr. A. Smith, M.P., speaking in the House of Commons on 19<sup>th</sup> July 1858, said:

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<sup>33</sup> Deacon is wrong the dispute did not concern the right to wreck

<sup>34</sup> Deacon B., *Cornwall A Concise History* (2007) p 37

“It was remarkable that they never heard anything about the rights of the Crown to the bed of a river, or to land between high and low water mark on the shore of the sea, when there was anything to pay, but only when there was something to be received. If improvements were required the public had to pay for them; but if advantages were to be had, the Crown claimed them.”<sup>35</sup>

The extent of the Duchy of Cornwall’s right to the foreshore was examined in *Penryn v Holm* (1877)<sup>36</sup>. It was decided the Great Charter of 1337 conveyed to the Duke of Cornwall all the rights of the Crown in the foreshore of the county of Cornwall and not merely the foreshore attached to the Accessionable Manors granted by the Charter.

### 1860 to 1870

This decade is important in the development of the Duchy. Prince Albert died in 1861. In 1838, before he was appointed to the Prince’s Council, the Duchy’s gross income was £24,885 (approx. £1.25 million in 2011) leaving £11,536 (approx £580,000 in 2011) after all costs had been paid. By 1861 gross income had grown to £60,753 (approx. £3 million in 2011) leaving £46,676 (approx. £2.3 million in 2011) after costs. An impressive achievement<sup>37</sup>. The surplus was often used to purchase Government Bonds, shares and similar investments supplying an alternative source of income to that provided by the landed estate. Prince Albert:

“..had brought the Duchy back from the precipice, reinvigorated it by establishing a new management structure and provided it with a sense of purpose.”<sup>38</sup>

### Right of Wreck

This dispute continued for many years. The Duchy perceived that this right, which had not been asserted with any energy for some time, might generate some income. The Secretary to the Duchy, James Gardiner, declared in 1860:

“...the prerogative right of the Crown to wreck of the Sea so far as regards the entire County of Cornwall inalienably settled by the Legislature in the reign of Edward the 3<sup>rd</sup> upon the Heir Apparent of the Crown.”<sup>39</sup>

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<sup>35</sup> HC Debate 19<sup>th</sup> July 1858 vol. 151 cc 1750-4

<sup>36</sup> *Penryn Corporation v Holm* (1877) (L. R.2 Ex D 328) p 332

<sup>37</sup> Haslam, op. cit. p 55-56

<sup>38</sup> Haslam, p. cit. p 57

Therefore, he stated, the Merchant Shipping Act 1854 did not apply to Cornwall and the Board of Trade had no jurisdiction. Gardiner went on to say:

“...they seem to have assumed that there is no distinction between the County of Cornwall and other parts of the Kingdom and have dealt or propose to deal with the subject as if no distinction existed.”

It was also asserted by the Duchy that the:

“Grant of the whole interest of the Crown in Cornwall not identical to grants to ordinary Lords of the Manor.”<sup>40</sup>

The matter, as with previous disputes, was submitted to the Government’s Law Officers. In 1862 they decided the Merchant Shipping Act 1854 did apply to Cornwall. Despite that, a new committee was formed in 1868 to enquire into the rights to wreck<sup>41</sup> before the issue was finally resolved.

There is no question of the Duchy not being subject to the Act by virtue of it enjoying Crown Immunity.

#### Right to Royal gold and silver mines in Cornwall

The decision of Sir John Patteson in the Cornwall Foreshore Dispute, the Duchy said, meant that it had *prima facie* the right to the Royal Mines of gold and silver in Cornwall. Thus the *Onus probandi*<sup>42</sup> rested with the Crown. It was for the Crown to rebut the argument rather than for the Duchy to prove its case<sup>43</sup>. The Duchy went on to say on 11<sup>th</sup> February 1860:

“The mature decision of Sir John Patteson should be treated as setting at rest questions of this nature between the Sovereign and the Duke of Cornwall and that the superior title of the latter to all territorial rights whether prerogative or otherwise within the precincts of his Duchy should not now be questioned.”

The papers were forwarded to the Government Law Officers with a statement from the Officers of Land Revenue which said, amongst other things:

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<sup>39</sup> TNA BT 243/262 - Duchy of Cornwall: Legislation relating to right to wrecks of the sea (1856 -1985)

<sup>40</sup> *Ibid*

<sup>41</sup> TNA MT 9/5982 – Duchy of Cornwall Investigations into manorial rights and title to unclaimed wreck (1868 – 1949)

<sup>42</sup> The onus of proof

<sup>43</sup> TNA TS 27/818 – Treasure Trove – mining rights claim by Duchy of Cornwall (1907 -1932)

“It is conceived that the decision of Sir John Patteson has no bearing upon the question – the right of the Crown to Royal Mines is not a Territorial but a Sovereign or Prerogative right and a grant of all the King’s Territory in a particular county would not without express words pass the Sovereign’s right to Royal Mines.”

The Government Law Officers went on to say “..it is submitted that the burden of proving title to them clearly rests upon the Duchy.”

The Opinion, dated 29<sup>th</sup> May 1860, was as follows:

“We are not satisfied that the facts and matters relied on in support of the claim are in anywise sufficient to countervail the general principle of law *that Royal Mines are a Prerogative Right of so high a character as not to pass by any royal grant except by express words of which we find none* (emphasis added) in the Charters by which the Duchy of Cornwall was created and its possessions granted.

*It is however not seemly or proper that a question of this kind between Her Majesty and the Prince should be subject of legal proceedings* (emphasis added) and in the course of our Conference with the Prince’s Attorney General it appeared to us and which view as we understood met with his full concurrence that the question should be considered by some former Judge of the Highest position and eminence.” (emphasis added)

The issue seems to have rested until 1879 when the question was again raised of submitting the matter to arbitration<sup>44</sup>. In 1880 it was suggested Lord Penzance act as arbitrator<sup>45</sup>. In a letter to Lord Penzance it was stated:

“It is considered both by the Queen’s Government and by the Prince of Wales in Council to be highly desirable *to have this question set at rest without adverse litigation* (emphasis added) between Her Majesty and His Royal Highness and it is considered that the best mode of proceeding will be to follow, as nearly as

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<sup>44</sup> TNA T 1/16350 – Duchy of Cornwall: arbitration on Crown’s right to royal gold and silver mines in Cornwall. (1879)

<sup>45</sup> TNA T 1/12673 – Duchy of Cornwall – question of title to Royal Mines to be settled by arbitration (1880)

circumstances will admit the course adopted some years since when similar questions between the Crown and the Duchy as to undersea Mines were referred to the late Sir John Patteson.”

The dispute would appear to have been placed in abeyance until 1882/3 when the question was once more discussed. The Office of Woods wrote that it was undesirable the resolution to the question should be postponed but the Duchy did not feel able to sanction the expenditure of a large sum of money to secure a “right so small as has been received from Royal Mines.”<sup>46</sup>

In a letter dated 26<sup>th</sup> June 1883 the Duchy, which was clearly not keen for the matter to go to arbitration, said:

“The confident hope is entertained that upon the facts and considerations now brought forward many of which are probably new to the Officers of the Crown, the Lords Commissioners of the Treasury acting on their advice will feel no hesitation in admitting the proposition contended for on the part of the Duchy and thereby give effect to the *great constitutional settlement* (emphasis added) effected by King Edward the Third and His Parliament..”

The Crown however persisted in its view that the Duchy claims were not sufficient to:

“..countervail the principle of law that Royal Mines are a prerogative right of so high a character as not to pass by any royal grant except by express words which are not to be found in the Duchy Charters.”

The matter was left and remains outstanding.

The web site of the Crown Estate once asserted:

“Today the prerogative rights to gold and silver are part of The Crown Estate. This is true for all of the UK although in the past, in some limited areas in Scotland, this right has been transferred from the Crown by ancient charter.”<sup>47</sup>

The Crown maintains its position as does the Duchy.

The Limitation Act 1980 section 37(6) says:

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<sup>46</sup> TNA T 1/14831 – Duchy of Cornwall title to gold and silver mines (1883)

<sup>47</sup> [http://thecrownestate.co.uk/our\\_portfolio/rural/minerals.htm](http://thecrownestate.co.uk/our_portfolio/rural/minerals.htm). Since questions were raised with the Crown Estate the web site has been changed and its claims are now less obvious than before.

“Nothing in this Act shall affect the prerogative right of Her Majesty (whether in right of the Crown or of the Duchy of Lancaster) or of the Duke of Cornwall to any gold or silver mine.”

No such saving clause would be necessary if the assertion by the Crown Estate was accurate. It does appear there remains some ambiguity in the situation.

In a letter from Mr Jonathan Crow Q.C., the Attorney General to H.R.H. the Prince of Wales to the writer, he says in relation to Royal Mines:

“...no such concession has been made but equally there has been no occasion recently for the Duke to assert any right in relation to Royal Mines in Cornwall.”<sup>48</sup>

#### The Report of the Prince’s Council 1862

In 1862 the Prince of Wales, on reaching age twenty one, took full control of the Duchy and became entitled to all its income and the accumulated surplus from the Duchy of Cornwall which amounted to £570,000 (at least £41 million in 2012) which was: “expended on the purchase of Sandringham, the building of stables at Marlborough House and the provision of plate.”<sup>49</sup> In addition to the income of the Duchy he also received an annuity from the Civil List of £40,000.

A Report was produced by the Prince’s Council which summarised “...the features of the system of management...and the results that have been produced.”<sup>50</sup>

The Report states:

“It has been the anxious desire of the Council to avoid involving His Royal Highness in legal proceedings, and they have in all cases where it appeared practicable to do so without material prejudice to Duchy interests made disputed questions the subject of compromise or other mode of settlement, rather than recourse to law.”

Examples of the disputes which arose and which it was hoped would be settled by compromise had been:

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<sup>48</sup> Letter to writer from Attorney General to HRH the Prince of Wales 24<sup>th</sup> October 2011

<sup>49</sup> TNA T 168/52 – Treasury Papers of Sir George Hamilton and Sir Edward Hamilton (1901 - 1904)

<sup>50</sup> Report to Her Majesty the Queen from the Council of H.R.H. The Prince of Wales 1862 p 12

“..an inquiry into the rights of the Duchy in the Forest and adjacent Commons of Dartmoor...these right are now involved in much obscurity, and their enforcement by legal process would necessarily be attended with expense.”

Reference is also made to questions surrounding the waters of the Tamar, “particularly the soil and mineral under that water.”

The dispute regarding the “minerals under the sea and other tidal waters around and within Cornwall” comes in for comment. The Council stated:

“..the real question being whether His Royal Highness stood in the position of merely an ordinary proprietor of certain specified estate within the county, or whether he was in fact the Seigniorial Lord of the entire county., *holding the same position there, so far as regarded territorial rights, as the Sovereign does in other parts of the Kingdom* (emphasis added). It was considered that it would be highly desirable.....to have the question..set at rest without adverse litigation, which, if it had been resorted to, must have nominally been between Your Majesty on the one part and His Royal Highness on the other..”

The matter was, as we have seen, put to arbitration and, according to the Duchy:

“This decision, which in effect established the right of His Royal Highness as superior Lord of the soil of the entire County of Cornwall, and as such, his title to the foreshores was submitted to and confirmed by Parliament in an Act.”

It was then explained the legal costs had amounted to £2,000 (approx £98,400 in 2012) but the income generated as a result of the finding in the Duchy’s favour amounted to £4,800 (approx £236,200 in 2012).

It was revealed that in 1842 the Duchy disputed that the accounts of the Sheriff for Cornwall should be submitted to the Treasury as opposed to the Auditor of the Duchy “some revenue being derived from this source.” Eventually in 1846 the Council agreed that accounts should be submitted to the Treasury with the proviso such agreement:

“...was not to be considered as prejudicing in any way the rights and privileges of His Royal Highness the Prince of Wales.”

Yet another argument surrounded the right of wreck in Cornwall, considered already. The Council said:

“For many years no income was derived from it. ...It was considered desirable to take advantage of certain measures before Parliament..*Some small revenue may now therefore be anticipated from this source without material expense to the Duchy...*” (emphasis added)

The Report confirms the insistence of the Duchy on its “constitutional rights” when the assertion of those rights would generate some financial advantage to the Duchy. It also demonstrates the reluctance of the Duchy to engage in litigation which would have been unseemly, expensive and possibly of uncertain outcome.

#### The Duchy Management Act 1863

Passed after the death of Prince Albert this Act enshrined in law many of the reforms initiated by him. It established a modern structure, subject to various constraints, and liberalised the options available to the Duchy. The original Act has been supplemented by various other Acts including the Duchy of Cornwall Management Act 1868, the Duchy of Cornwall Management Act 1893 and the Duchy of Cornwall Management Act 1982. These are now referred to as “the Duchy of Cornwall Management Acts 1863 to 1982” and these Acts determine the parameters within which the Duchy can operate and more particularly set out those circumstances in which Treasury approval is required before a transaction can take place.

#### Treasure Trove – Luxulian Cornwall 1864

According to National Archive records Treasure Trove, being silver and gold coins, from the reigns of Queen Elizabeth, King James and King Charles I, were found in the churchyard of Luxulian Parish. They had very little value<sup>51</sup>. The Duchy asserted its right to them and the Solicitor to the Treasury asked for copy documents under which “the claim of the Duchy was founded.” Copies of the Duchy Charters were sent. It was made clear by the Duchy:

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<sup>51</sup> TNA TS 25/1330 – Treasure Trove at Luxulian Claim by Duchy of Cornwall (1864)



“These Charters will enable you to form an unsatisfactory opinion as to the extent and nature of the property and rights intended to be conferred upon the Dukes of Cornwall.”

The Cornwall Foreshore Case was referred to and it was explained Sir John Patteson had found it necessary to consider:

“the early history of Cornwall and its Earls as well as Records and facts subsequent to the Creation of the Duchy. In that case as *in the present the right was inferential* only there not having been any express Grant of the Foreshore which Sir John Patteson nevertheless decided to be part of the Territorial possessions of the Duchy.” (emphasis added)

They went on:

“The result of the enquiry leads to the conclusion that at all events so far as the County of Cornwall is concerned all rights previously vested in the Crown other than that of Royal jurisdiction were vested *jure ducutus* (rights of the Duke) in the Royal personage whether the *Sovereign or the Duke of Cornwall (considered in law to be one and the same person – see observation of the late Mr Justice Bayley in Rowe v Brenton (1828)*<sup>52</sup>) for the time being entitled under the limitation contained in the Charter to the possessions of the Duchy. A particular argument in favour of the Duke’s right to Treasure Trove may be deduced from the fact that this description of casual revenue was by Act of Parliament expressly recoverable for the Crown by the Coroner and the 3<sup>rd</sup> Duchy Charter which (according to the decision in *Jewison v Dyson (1842)*<sup>53</sup>) gives the Duke the right of appointing that Officer within Cornwall expressly prohibits any such Minister of the Crown acting within Cornwall.” (emphasis added)

Once more the Government Attorney and Solicitor General was asked to advise and their Opinion was:

“We think that it would be inconsistent with the terms of the Charters for the Crown to hold any Inquest of Treasure within the Duchy of Cornwall: and it

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<sup>52</sup> *Rowe v Brenton* (1828) (8 B & C 737) (3 Man & Ry KB 133) (108 E.R. 1217) (Concanen’s Rep 1)

<sup>53</sup> *Jewison v Dyson* (1842) (9 Meeson and Welsby 540) (152 E.R. 228)

seems to us to be a legitimate inference from the general tenor of the Charters, and especially from the clauses which exclude all Ministers of the Crown from entering any lands of the Duchy to make execution of any writs (illegible) that the Duke of Cornwall and not the Queen, is entitled to the Treasure Trove in question.”

This dispute is important because it refers to the Earls of Cornwall and rights not expressly set out in the Duchy Charters but those arising through “legitimate inference”.

#### Seaward Limits between the Crown and the Duchy of Cornwall 1865-1870

This is another matter which was submitted to arbitration. In this case to Sir John Taylor Coleridge. The Duchy did not enjoy the same success as when arguing to its right to the Foreshores of Cornwall even though relying heavily on the material previously submitted to Sir John Patteson. The statements made by the Duchy in support of its claims are instructive.

In Reply to the response of the Crown to the initial claim the Duchy argued, really rather angrily:

“...that the Crown being in point of law, as against an ordinary subject, *prima facie* entitled to, and deemed in possession of the bed of the sea and maritime territories within the Realm, which puts such *ordinary subject to proof of his title, before the Crown can be dispossessed;....when property of a similar nature is the subject of discussion between the Duchy and the Crown, for no better reason, as it would appear, than the particular character of the property. This proposition has been before frequently asserted, on the part of the Crown, but always contested on the part of the Duchy.* (emphasis added) It was alluded to at the preliminary meetings before the Arbitrator, in the present case, and then protested against, and the Officers of the Duchy must beg to be understood as again most distinctly declining their assent to it.”

The Duchy continued:

*“In asserting such a proposition, the Officers of the Crown appear to be unmindful of the relative position of the High Personages represented, in any question between the Crown and the Duchy; to lose sight altogether of the object*

*of the Parliamentary Charters relating to the Duchy of Cornwall, already alluded to in the Duchy statement, and of the exceptional position in which the property passing under these Charters, with all its incident Regalities and territorial rights is placed by their peculiar limitation; which effect a setting apart of a portion of the Hereditary Possessions of the Crown for a specific purpose. Such possessions still remaining Royal Possessions, and unsevered from the Crown...”*

Later:

“..but that as against the Crown, a liberal construction ought to be given to the language of this part of the Act, with a view to give full effect to, and carry out the original intention of the Royal Founder of the Duchy of Cornwall; and which, it is submitted; in erecting, with the consent of the Legislature, the former Earldom of Cornwall, *with its ancient possessions*, into a Duchy, as a fitting maintenance for all time, for the Heir apparent of the Throne of the Realm of England, and *as a means of training and qualification for the future government of the Kingdom* (emphasis added), could only have set apart for that purpose from the hereditary possessions of the Crown every territorial right, as well maritime, as inland, at the date of the Charters, belonging to or capable of exercise or enjoyment by the Crown, in that portion or section of the Realm of England, represented by the territory usually called the County of Cornwall. In this view the Duchy Charters can never bear the limited construction, as against the Crown, which might perhaps be placed upon them, *if they were grants to an ordinary subject but a more ample rendering of their provisions must always be allowed in every respect, considering the nature of the grants, the Personages to whom made, and the plain intention of transferring every species of Royalty, consistent with the subordination of the King’s authority*”(emphasis added).

The Officers of the Crown showed some little frustration in the exchange in correspondence. They claimed the Duchy did not know the difference between “..territorial and sovereign rights” and that “The Prince of Wales carried no sovereign or

territorial rights”. They also got irritated with the; “Reliance on antiquarian suggestions as to the ancient status of Cornwall.”<sup>54</sup>

Matters arising from this dispute can be summarised thus: A significant disagreement was resolved not by judicial process but by arbitration albeit by a distinguished member of the judiciary; a private estate is objecting to being treated like a private estate. Claiming it has a special position and should be treated differently; next the reference of the Duchy to the “peculiar” limitation of the Charters such that sometimes the Duchy is in the Crown and sometimes in the “hands” of a subject of the Crown; and finally, by inference, the inheritance of the Duchy of the of the rights of the Earls of Cornwall.

*Attorney General to the Prince of Wales v Crossman (1865-1866)*

This is another matter which considered whether the Duchy enjoyed the same rights as the Crown.<sup>55</sup> The issue was: since the Crown in any litigation “would be entitled to lay and keep the venue where it pleased” would the Duchy enjoy a similar privilege? The Court decided that the Attorney General to the Prince of Wales must be “taken to be in the same situation as the Attorney General to the Crown”, however, the Court had no need to decide this particular issue of venue as it was able to make a decision based on other considerations.

*The Solicitor to the Duchy of Cornwall against Next of Kin etc of Thomas Canning (1880)*

The Attorney General to H.R.H. the Prince of Wales argued, and it was accepted by the Court that:

..the Prince is on the same footing in respect of his duchy as the Crown is in respect of the rest of the kingdom. The Charters of the duchy have always been treated both by the legislature and judiciary as having vested in the Dukes of Cornwall the whole interest and dominion of the Crown in and over the whole county of Cornwall.”

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<sup>54</sup> TNA LRRO 11/15 - Statements relating to the dispute between the Crown and the Duchy of Cornwall concerning seaward extent of Cornwall (1865)

<sup>55</sup> *Attorney General to the Prince of Wales v Crossman* (1866) (L.R. 1 Ex p 381)

A significant case because it is the one quoted by the Land Registry in support of the right of the Duchy of Cornwall to *bona vacantia* and escheat within Cornwall<sup>56</sup>.

#### A Royal Warrant to the Lord Warden of the Stannaries 1889

The Duchy of Cornwall wished for a Royal Warrant to be issued to the Lord Warden of the Stannaries “in like manner as is issued to a Lord Lieutenant of an English County”<sup>57</sup>. The background is as follows. Letters Patent were issued under the Royal Seal in 1865 “arraying the Royal Cornwall and Devon Miners Regiment of Militia”<sup>58</sup> to the then Lord Warden of the Stannaries, Lord Portman. On the death of Lord Portman, the Earl of Ducie was appointed Lord Warden of the Stannaries under the Seal of the Duchy of Cornwall and the then Duke wished to have a similar Royal Warrant under the Royal Sign Manual. After certain correspondence the Secretary to the Duchy wrote:

“As the issue of a Warrant by the Crown for a commission to the Lord Warden of the Stannaries is therein declared to be still lawful though not necessary, His Royal Highness (The Prince of Wales) trusts that the War Department will take the requisite steps for obtaining the Warrant to issue such a commission as may be necessary with the altered circumstances, in order to avoid any diminution in the dignity of the Office which for generations has been enhanced through the Lord Warden’s holding the Commission from the Crown.”<sup>59</sup>

Further correspondence ensued and in May 1889 the Crown Office wrote as follows:

“It appears to the Clerk of the Crown there are considerable difficulties in the way of issuing a Commission to the Warden similar to that issued to a Lord Lieutenant.

In the first place the Lord Lieutenant is appointed by the Crown, while the Warden is appointed by the Duke of Cornwall. The commission required can

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<sup>56</sup> *The Solicitor to the Duchy of Cornwall v Canning* (1880) (5 P.D. 114 Probate) p 144

<sup>57</sup> TNA C 197/18 - Commission for management of the Duchy of Cornwall (1827 – 1889)

<sup>58</sup> Volunteer regiments first appeared in the Napoleonic Wars as a response to the fear of a French invasion. They were later absorbed into the Territorial Army and were frequently recruited from occupational groups so a unit recruited from tinnerns in that context was not remarkable. See for example Cornwall Record Office X355/48 - “Precept from Lord Warden of the Stannaries to...chief constable to issue warrants to petty constables of all parishes..to return list of miners between ages of 18 and 45 liable to serve in Miners’ Regiment of Militia”

<sup>59</sup> TNA C 197/18 op. cit.

therefore confer no office but only powers to be vested in an office appointed by another authority.

Secondly – The powers conferred ought not, the Clerk of the Crown submits to be general powers (“to do all and singular such acts or things as to a Lord Warden belong”) – Such as conferred on a Lord Lieutenant, as such words would amount to a confirmation by the Crown of the Wardens appointment a *proceeding which would be “ultra vires” and an encroachment on the jurisdiction of the Duke of Cornwall.*” (emphasis added)<sup>60</sup>

A warrant was eventually issued under the Royal Sign Manual.

The Attorney General to H.R.H. Prince of Wales in correspondence has advised no such Warrant has been or is now requested<sup>61</sup>.

#### The Duchy and the Stannaries

A separate Chapter will be devoted to the Stannaries. Suffice at this stage to note the Stannary Courts (Abolition) Act 1896 was passed which brought to an end any judicial function exercised by the Duchy.

#### *C The Twentieth Century*

In 1901 Queen Victoria died and her eldest son became King Edward VII. Thus, Edward’s son, George became the Duke of Cornwall. The new King like his mother continued to pay income tax on his Civil List until 1903 when he managed to persuade the Government this should not continue<sup>62</sup>. The Duke of Cornwall remained liable to income and supertax in full on income from the Duchy of Cornwall<sup>63</sup>.

#### Duchy of Cornwall – Land Tax and Valuation 1913

This is a matter of great importance. It will be summarised in this section and, in a later Chapter where the issue of Duchy finances is examined, it will be considered in more detail. The papers are reproduced in Appendix H.

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<sup>60</sup> Clerk to Crown letter 1<sup>st</sup> May 1889

<sup>61</sup> Letter to writer from Jonathan Crow QC Attorney General to HRH Prince of Wales 10<sup>th</sup> January 2011

<sup>62</sup> TNA T 168/71 – Papers relating to taxation and property rating of members of the Royal Family (1899-1904).

<sup>63</sup> TNA T 160/632 – Royal Family Civil List in relation to the hereditary and temporary revenues of the Crown (1936)

From 1849 the Duchy had paid income tax to which all landlords were liable. In 1913 the Inland Revenue approached the Duchy about submitting valuations and paying a new landlord's tax on income from mineral royalties under the Finance (1909-1910) Act 1910<sup>64</sup>. The Government Law Officers were asked to advise. The instructions issued to them are a masterful summary of the issues by the Solicitor acting for the Board of the Inland Revenue.<sup>65</sup> To quote from those instructions:

“....the duty to give particulars..is resisted by the Duchy upon the broad ground that the Prince of Wales possesses the same prerogatives as the King<sup>66</sup>, and that inasmuch as the King is not bound by the provisions of a statute unless expressly named, the Prince of Wales either absolutely, or at all events so far as the lands of the Duchy of Cornwall are concerned, is not bound by the provisions of Part I of the Finance Act 1910.”

The instructions then explain that the particular prerogative with which the instructions were concerned, Crown Immunity, was unlike any other differing in “substance” from other prerogative rights such as the right to royal fish and foreshore. The instructions point out under the Bill of Rights 1688 the Sovereign could not prevent application of an Act of Parliament by exercise of his prerogative power. The precise wording of the Bill of Rights is:

“That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without consent of Parliament is illegal.”<sup>67</sup>

The solicitor to the Board of the Inland Revenue maintained the Prince of Wales is a subject of the Crown albeit the “first of His Majesty's subjects” and the estate is a “private estate”. In those circumstances the King could not choose to suspend an Act of Parliament as it applied to that “private estate”.

The papers then say:

“Search has been made for any authority directly laying down the proposition that the Duke of Cornwall qua his rights over Duchy lands, or that the Prince of Wales

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<sup>64</sup> TNA LO 3/467 – Duchy of Cornwall – Land Tax and Valuation (1913)

<sup>65</sup> Hall, P., *Royal Fortune* (1992) p 54

<sup>66</sup> At this time the King was George VI and the Prince of Wales was the future Edward VIII, Duke of Windsor

<sup>67</sup> Bill of Rights 1688

as such, is not bound by statute unless expressly named. No such authority has been found and (the Duchy) when pressed on the point was not able to point to any authority.”

The Duchy argued that the: “prerogative rights of the Duchy are identical with those of the Crown” and “That in fact Duchy lands are Crown lands and the same principles apply.” The Board of the Inland Revenue acknowledged, for reasons set out in the Instructions, that the Duchy was “entitled to press the argument..to the fullest extent, but it is submitted that even when so pressed that argument does not go very far.”

Reference is made in the papers to cases considered earlier including *The Attorney General to H.R.H. the Prince of Wales v St. Aubyn*<sup>68</sup> and *Rowe v Brenton*<sup>69</sup>. In particular the description of the Duchy given by Lord Tenterden in that latter case in which he refers to the “..very peculiar nature of the Duchy” and the “Crown’s peculiar interest in (the Duchy) at all times.” The Duchy once again referred to the Cornwall Foreshore Dispute papers which the Inland Revenue regarded to a great extent as “irrelevant”. There is also reference to a dispute between the Duchy and the Admiralty in 1904<sup>70</sup>. However no mention is made of the disagreements which arose with regard to the Queen’s Remembrancer’s Fees and Royal Mines which would have supported the Inland Revenue’s position.

The Board of the Inland Revenue specifically states:

“It may be mentioned that the Crown Private Estate Acts do not appear to apply to lands of the Duchy of Cornwall those lands being expressly exempted, or excluded under general provisions which prevent those Acts from applying to lands which are possessed by the Sovereign through inheritance from his predecessors.”

The most difficult issue of all is then addressed: the position when either there is no Duke of Cornwall or he is a minor. The solicitor to the Board of the Inland Revenue then said:

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<sup>68</sup> *Attorney General to H.R.H., Prince of Wales, Duke of Cornwall v Sir John St. Aubyn and others* (1811) (Wight 167)

<sup>69</sup> *Rowe v Brenton* (1828) (8 B & C 737) (3 Man & Ry KB 133) (108 E.R. 1217) (Concanen’s Rep 1)

<sup>70</sup> In response to enquiries the Ministry of Defence, the Attorney General’s Office and the National Archives say they have no papers relating to such dispute.



“..it may be argued that, having regard to the interest which the Sovereign has at all times in the Duchy....the prerogative of the Crown whatever may be the case when the Duke is of age, applies to the Duchy lands and, the Crown not being named in the Finance Act 1910 Mineral Rights Duty is not payable...the practical result may be that no returns can be enforced and no duty can be recovered until after the Duke of Cornwall attains his majority.”

The instructions to counsel prepared by the Board of the Inland Revenue demonstrated a great deal of research. They identify there is no basis in statute or case law for the Duchy enjoying Crown Immunity. The recognised authorities on the Prerogatives of the Crown make no mention of such a privilege. The difficulty created by the fact the Duchy oscillates between a Duke and the Crown is also considered. The reply received from the Law Officers does not tackle any of these issues. They simply assert that:

“We are of the opinion that the same principles which render the provisions of any Act of Parliament inapplicable to the Crown unless the Crown is expressly named, apply also to the Prince of Wales in his capacity as Duke of Cornwall. This result arises from the peculiar title of the Prince of Wales to the Duchy of Cornwall. In other respects the Prince of Wales as being the first subject of the Crown is like other subjects bound by Statutory enactments.”

The Law Officers opinion, which ignores the issues raised by the Inland Revenue and the authorities they represent, stretch the definition of the Crown in an unexpected way. This opinion is the basis upon which the Duchy continues to claim Crown Immunity and, amongst other things, its privileged tax position.

They then went on to say:

“We would strongly deprecate the bringing to an issue of questions such as those here set out. It is obvious that if such a matter were litigated the Duchy of Cornwall might find *that even though they succeeded their success in the Courts did not conclude the matter* (emphasis added)”.

In 1921 the Law Officers were again consulted<sup>71</sup>. The Prince of Wales had continued to pay tax “as an act of grace”.

The Law Officers responded that their opinion was unchanged. The Prince of Wales agreed to pay £20,000 (approx £657,000 in 2012) per annum as a voluntary contribution in lieu of tax. From 1921 until 1982 although the Duchy continued to present its accounts to Parliament as it was obliged to do, it did not publish them. The accounts which were presented to Parliament show the voluntary contribution under the heading “taxes and parish rates”<sup>72</sup> which is clearly misleading.

Edward VIII during the negotiations in connection with his abdication claimed poverty since he had not benefited under the will of his late father. It transpired he had managed to “tuck away” £1,000,000 (£52 million in 2012 values) largely from Duchy revenues a fact about which he kept very quiet and was the cause of great resentment when it was discovered<sup>73</sup>.

In 1971 – 1972 a Select Committee on the Civil List stated:

“The income from the Duchy of Cornwall is exempt from all taxes. The exemption is based on an opinion given by the Law Officers of the Crown in 1913 and again in 1921. The tax exemption apparently arose from “the peculiar title of the Prince of Wales to the Duchy of Cornwall”. *The judgement was very short and a little inscrutable. It did not say what was peculiar or special.* Nevertheless, the Inland Revenue accepted it without question. There has been no further explanation or elucidation”<sup>74</sup>. (emphasis added)

Mr. Strudwick, Assistant Secretary Board of the Inland Revenue, when he appeared before the Committee said in reference to the 1913 Opinion:

“Their answer, I am afraid, which is all I have, does not really take us much further, because they simply said (*that Crown Immunity applies*).. also to the Prince of Wales in his capacity as Duke of Cornwall....That is all they said.”<sup>75</sup>

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<sup>71</sup> TNA IR 40/16549 – The Duchy of Cornwall Taxation (1921)

<sup>72</sup> Hall, op. cit. p 57

<sup>73</sup> Hall, op. cit. p 70

<sup>74</sup> House of Commons *Report from the Select Committee on the Civil List 1971 -1972* HC29 para. 48

<sup>75</sup> *Ibid* p 348

It is extraordinary that an institution which describes itself as a “private estate” and is similarly described by Government should enjoy Crown Immunity and, therefore, such a privileged tax status based on a “short and inscrutable” opinion which has never been challenged or revisited.

“This Office is heavily handicapped in dealing with the Duchy”<sup>76</sup>

The Office of Woods, in connection with enquiries it was making, wished to obtain a copy of the Great Charter of Edward III. On 17<sup>th</sup> August 1921 it wrote to the Public Records Office as follows:

“The alternative is to get these from the Duchy. The attitude of *that Department* (emphasis added) as evidenced by past proceedings is not likely to be helpful to me and we must therefore pursue this matter as best we can”.

Later in the same year the Office of Woods wrote:

“This Office is heavily handicapped in dealing with the Duchy. Thus little information or letters, and the Duchy has shown itself disinclined to afford this office any facilities.”

It is noted that once again the Duchy is referred to as a Department. The obvious frustration of the Office of Woods is clear.

#### *D Prince Charles Duke of Cornwall 1952 – date*

When his grandfather died and his mother became Queen on 6<sup>th</sup> February 1952, Prince Charles, who was born on 14<sup>th</sup> November 1948 and was just over three years old, became immediately Duke of Cornwall (peerage of England) and Duke of Rothesay (peerage of Scotland). As he was a minor, in accordance with the Duchy of Cornwall Management Act 1863 section 38, the Duchy was managed on his behalf by persons nominated by the Queen until he reached age 21. The Civil List Act 1952 section 2 provided that the Civil List shall be reduced by 8/9ths of the income of the Duchy with the remaining 1/9<sup>th</sup> utilised for the benefit of Prince Charles. At the age of 18 years Prince Charles became entitled to £30,000 (over £440,000 in today’s value) per annum for three years until he reached age 21 at which point he became entitled to all the income from the Duchy. It would appear no tax was paid on the Duchy income. Therefore over £413,000 (equivalent

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<sup>76</sup> TNA CRES 34/49 - Office of Commissioners of Crown Lands and predecessors (1921)

to over £5 million in 2012) had been accumulated tax free for Prince Charles when he attained age 21<sup>77</sup>.

#### Proportion of Duchy income surrendered by Prince Charles on reaching age 21 - 1969

There were negotiations between the Royal Household and the Government about the amount of income which Prince Charles should surrender when he reached age 21 and thus became entitled to all the income from the Duchy. At the time the annual surplus was £250,000 (approx.. £3.19 million in 2011) there was a surtax of 50%<sup>78</sup> and marginal rates of income tax were 90%. The proposal was put forward that the Prince should surrender half the Duchy income to the Treasury. In a note to the Prime Minister<sup>79</sup> it was explained “The (Royal) Household have reluctantly accepted this solution”. In a memorandum to the Prime Minister marked “CONFIDENTIAL” from an official at the Treasury Chambers dated 7th July 1969 it says:

“...a fifty per cent surrender is the largest amount for which we can hope to be able to settle with the Palace without an embarrassing and time-consuming row.”

#### Report of the Royal Trustees 11 February 1993<sup>80</sup>

This report confirmed the Queen and the Prince of Wales as Duke of Cornwall enjoyed “Crown Immunity” and, therefore were not obliged to pay tax. However, new arrangements were to be put in place such that tax would be paid on a voluntary basis. In so far as the Prince of Wales is concerned it was agreed he would pay income tax on that part of the Duchy income used for personal expenditure. The Duchy of Cornwall would remain exempt from Capital Gains Tax.

The Prince of Wales web site states that Prince Charles spent £9.831 million on official duties and charitable functions for 2011/12. His Income and Value Added Taxes for the year totalled £4.496 million. His total non official expenditure was £2.609 million<sup>81</sup>.

The 1993 Report stated that the Prince of Wales would pay the full market rent for the use of Highgrove. He would also be able to claim income tax relief on that proportion of

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<sup>77</sup> House of Commons *Report from the Select Committee on the Civil List* op. cit. para. 28

<sup>78</sup> Inland Revenue TA.2 Rates of Surtax 1948-49 to 1972-73

<sup>79</sup> TNA PREM 13/2906 - Proposal for dealing with revenues of Duchy of Cornwall (1969)

<sup>80</sup> House of Commons *Report of the Royal Trustees pursuant to the Civil List Act 1972*, 11 February 1993 HC464

<sup>81</sup> The Prince of Wales and the Duchess of Cornwall Annual Review 2012

the rent which represents the use of Highgrove for official purposes. There is no “formal” lease in place, according to Sir Walter Ross, Secretary and Keeper of the Records of the Duchy of Cornwall<sup>82</sup>, because the Duchy takes the view the Duke of Cornwall is legal owner of the Duchy assets as quasi trustee and, therefore would enter into a lease with himself. In addition since Prince Charles as Duke of Cornwall is entitled to the income from the Duchy the rent he pays, in effect, is returned to him. The arrangement would seem to be an artificial accounting exercise.

### Sovereign Grant Act 2011

This Act provides when there is a Duke of Cornwall who is a minor the Sovereign Grant is reduced by 90%. When there is no Duke of Cornwall the heir to the throne will receive the income except if he is minor in which case the Sovereign Grant will be reduced by 90%<sup>83</sup>.

The Duchy of Cornwall will be used to support the Heir to the Throne. It is an unusual for a “private estate” to have its income directed by Statute and, as far as can be established, a unique burden for such an entity to bear.

### The Duchy in 2012

The present Duke is the longest serving in the over 670 plus years history of the Duchy. He is certainly one of the most actively involved with the management of the Duchy. It is a vehicle he has used to exercise influence and indeed power. It has also been the means by which he has, for example, been able to implement his ideas with regard to architecture both in Poundbury in Dorset and shortly in Newquay in Cornwall.

According to the Duchy Accounts for 2012<sup>84</sup> it is a “leading private landed estate” with net assets of £728 million and a revenue surplus available to the Prince of Wales of £18.2 million. Without doubt, it is a successful and substantial organisation enjoying a range of privileges not available to other private landed estates. It is also expected to shoulder the responsibility of providing for the Heir to the Throne in both his or her public and private functions.

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<sup>82</sup> Evidence given during *John Kirkhope v The Information Commissioner and the National Archives* (2012) (EA/2011/0185) 7<sup>th</sup> February 2012

<sup>83</sup> Sovereign Grant Act 2011 section 9

<sup>84</sup> The Duchy of Cornwall Annual Report 31<sup>st</sup> March 2012

## *E Conclusion*

One hundred and seventy four years ago when Victoria came to the throne the Duchy faced extinction. Today it is in robust good health, indeed a significant financial institution, providing substantial resources to the Heir to the Throne. Its economic transformation, dating from the time when Prince Albert became responsible for the management of the Duchy, is remarkable. More impressive has been its ability to continue to define itself as a “private estate” albeit different from comparable estates. The Duchy has been prepared to claim to be part of the Crown and thus entitled to whatever privileges comes with that status as in the dispute with the Queen’s Remembrancer. It has also been prepared to make claims against the Crown when there is some benefit in doing so, for example, in the Foreshore Dispute. The disputes have been subject to arbitration for the commendable reason that the Duchy and Government did not want to incur lawyers’ fees and because it would be unseemly for a son to take action against his parent. Arbitration has been used so as to “prevent the great public inconvenience” which would arise from the conflict between Crown and Duchy. Litigation is to be avoided by the Duchy because, even though they may succeed, that would “not conclude the matter”. The Duchy is shown to be “persistent and jealous in its claims”.

The Opinions of the arbitrators are not consistent. More significantly the enjoyment by the Duchy of Crown Immunity is based not on statute or decisions by the judiciary but by arbitrators whose opinion was described in evidence to a House of Commons Select Committee as “inscrutable”. Since first it was offered in 1913 it has not been subject to any challenge. The issues raised by the Board of the Inland Revenue remain pertinent and have not been given the attention they deserve. It is not possible to provide a satisfactory basis upon which the Duchy enjoys Crown Immunity.

The Hereditary Revenues of the Crown were and are surrendered in exchange for the Civil List and in future for the Sovereign Support Grant. Thus if the Duchy succeeded, for example, in establishing its right to wreck, treasure trove, the minerals under the Foreshore of Cornwall and so on it would “claw back” to the “Royal Household” resources which would otherwise go to the Exchequer. While it may be “unseemly” for the son to litigate against his parent, in reality disputes were between the Duchy and the

Government Department, now the Crown Estate, which was responsible for the Hereditary Revenues.

In 1837 and 1889 the Duchy was described as an Office of State. In 1921 it was categorised as a Department of State. The Duchy explained the Charters, by which it was established, represented a “great Constitutional Settlement”. It was responsible for a judicial system, the Stannary Courts, and, arguably, has the right, still, to summon the Convocation of the Tinnars of Cornwall. From 1838, when it became obliged to present Annual Accounts to Parliament, it has been subject to limited oversight. However, the Accounts have never been discussed in the Commons or the Lords in any meaningful way. The Duchy has the right to be consulted on legislation which affects its “hereditary revenues, personal property and other interest”. The public has no right of access to the Duchy archives.

The situation is summarised by one writer as follows:

“...from public to private, from Prerogative of the Crown to claiming the rights of the ordinary citizen, and back again...Faced with taxation (the Duchy) is part of the Crown. Faced with disclosure, (the Duchy) is a private estate...”<sup>85</sup>

The Duchy of Cornwall occupies a place which is difficult to understand and to justify.

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<sup>85</sup> Hall, op. cit. p 125





## Chapter 5

### The Stannaries

*The Stannary system “...might almost be termed territorial independence..”<sup>1</sup>*

#### A Introduction

The Stannaries, which were not mentioned in Domesday and whose history begins in 1156 when they were first mentioned in the Pipe Rolls<sup>2</sup>, became a significant source of income for the Crown and Duchy. It is difficult to believe now but Cornwall was the chief source of tin for the Western world from early times until relatively recently<sup>3</sup>. The Charter of 1231 gave Richard, Earl of Cornwall “...the Stannary of Cornwall..” Similarly Piers Gaveston in 1307 was granted “...the Stannary and all mines of tin and lead...” for the County of Cornwall. By the Great Charter of 17<sup>th</sup> March 1337 Edward III granted to the Duke:

“.... Our Stannary in the said County of Cornwall together with the coinage of the said Stannary and all issues and profits thereof arising; and also the exprees, profits, and perquisites of the Court of Stannary, and the mines of the said County..”

As will become clear during the course of this Chapter the Stannaries represented not simply a valuable income source it allowed the Duchy of Cornwall to exercise considerable power in Cornwall and to a lesser extent in Devon. The head of the Stannary system was the Lord Warden of the Stannaries, an appointment which is still made. As was explained in the previous Chapter the Lord Warden had the power to summon a “Miners” Militia. There was a system of Stannary Courts whose officials, including the Stewards and Under Warden before whom cases were heard, were appointed by the Duchy. The final Court of Appeal from the Stannary Courts was the Prince’s Council headed by the Lord Warden.

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<sup>1</sup> Rowe, J., *Cornwall in the Age of the Industrial Revolution* (1953) (2<sup>nd</sup> Edition St Austell 1993) p 195

<sup>2</sup> Baring Gould, S., *Cambridge Geographies – Cornwall* (1910) p 796

<sup>3</sup> There is a tin miners’ legend that Cornish tin was used in Solomon’s temple and that Joseph of Arimathea travelled to Cornwall to trade tin bring with him Jesus Christ (See, for example King, P., *Plays and Places* Times Literary Supplement 6<sup>th</sup> Jan 2012)

The Duke of Cornwall had, and arguably still has, the power to summon Stannary “Parliaments” in Cornwall and Devon and the right to assent to legislation passed by those bodies. Until 1838 the Duchy operated a system of taxation called “coinage” based on the output of the Stannaries.

For a full understanding of the Duchy it is necessary to have some knowledge of the Stannaries and the Stannary system exercised it will be recalled by a “private estate”. There are still those who claim the Duke of Cornwall has obligations arising from his position with regard to the Stannaries which he fails to exercise.<sup>4</sup>

### *B Miners and Mining and the Law*

Mining is a dangerous and difficult occupation presenting complex problems for the lawyer. It is not surprising that special laws and customs developed, not simply in the United Kingdom but throughout Europe and beyond to deal with the issues which arose. To take a simple example, you might sink a shaft in your land but then it might pass under the land of your neighbour and maybe under the foreshore. Amongst some of the questions arising are: what rights do your neighbours have to the minerals underlying their land which you are mining? What if a stream or river diverted to wash the ore being extracted deprives everyone living downstream of their water source?<sup>5</sup>

Because of the danger to which they were subjected the medieval free miners were recognised as a special group. They had liberties by which their position was guaranteed. It is said not just of miners within England but those in Germany, France and Scandinavia as well:

“.. (he) formed with his fellows of the district a state within a state. His law was not the law of the realm but the law of the mine. He obeyed the King only when his orders were communicated through the Warden of the mines, and even then so long only as he respected mining law. His courts were the mine courts, his parliament the mine parliament.”<sup>6</sup>

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<sup>4</sup> <http://www.cornishstannaryparliament.co.uk>

<sup>5</sup> For more on this see Sir Edward Smirke *Case of Vice against Thomas with an Appendix of Records and Documents on the Early History of Tin Mines in Cornwall* (1843) and G. R. Lewis *The Stannaries – A Study of the Medieval Tin Miners of Cornwall and Devon* (1908)

<sup>6</sup> Page, W., *The Victoria History of the Counties of England and Wales* (1906) p 523

The structure which developed within Cornwall and Devon was called the Stannaries, which included an administrative and legal system, law courts, a “Parliament” and a form of taxation called “coinage”<sup>7</sup>. The Stannaries were initially concerned with tin mining but eventually covered “all metal mining”<sup>8</sup>. The word “Stannary” is derived from the Latin *Stannum* meaning tin. Devon’s Stannaries were similar to but differed in detail from those of Cornwall. The Duchy became responsible for the Stannaries in both Devon and Cornwall.

Stannary Law of Cornwall related not only to mining and associated matters but covered all aspects of the lives of those who were engaged in tin affairs. The Stannary Courts heard cases whether related to tin mining or not and whether the other party was a miner or not. Indeed “privileged tanners”, by the Charters of 1201 and 1305, were not to be hauled before ordinary Courts unless the case concerned murder, manslaughter and mayhem. Cases in which one of the parties was a “foreigner” or “non tinner” were held before juries consisting half of tanners and half of “non tanners”. The Lord Warden of the Stannaries, a Duchy official and a member of the Prince’s Council, mustered the men of the Stannaries for service in times of danger<sup>9</sup>. The Stannaries had their own regiment until 1913<sup>10</sup>. A curious echo of this provision can be found in the Reserve Forces Act 1996 which provides that if an Association is formed in Devon and Cornwall under the provisions of that Act then the Lord Warden of the Stannaries shall be ex-officio member<sup>11</sup>.

Dr John Rowe stated the Stannary system “...might almost be termed territorial semi-independence..”<sup>12</sup> According to Lewis:

“...the Stannaries were a peculiar jurisdiction under the operation of certain laws...for the administration of which a royal officer was responsible...The head of the Stannary system was the Duke of Cornwall.”<sup>13</sup>

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<sup>7</sup> The name “coinage” arose from the process of assaying. A *coign* was clipped from each block of tin to test in order to fix the price. (Midgley, L Margaret, *Ministers’ Accounts of the Earldom of Cornwall 1296-1297* (1942) p xxvii)

<sup>8</sup> Stannaries Act 1836

<sup>9</sup> See, for example file at Cornwall Record Office X355/48 “Precept from Lord Warden of the Stannaries to Richard Hawke, chief constable, to issue warrants to petty constables of all parishes in his hundred, to return list of all miners between 18 and 45 liable to serve in Miners’ Regiment of Militia.” (October 1821)

<sup>10</sup> Cornish Mining World Heritage – <http://www.cornish-mining.org.uk/story/medieval.htm>

<sup>11</sup> Reserve Forces Act 1996 Schedule 4 section 7

<sup>12</sup> Rowe, op. cit. p 195

## C     *The Origins of Stannary Law*

Lord Coke stated in the early 17<sup>th</sup> Century:

“This jurisdiction is guided by special laws, by customs and by prescription, time out of mind.”<sup>14</sup>

Stannary law, to quote Professor Robert Pennington from his comprehensive examination of the subject:

“... is still formally a part of the law of England. It is moreover one of the oldest parts of the law, for its origins predate the Norman Conquest, possibly even the Anglo Saxons..”<sup>15</sup>.

### The Sources of Stannary Law

Professor Pennington states Stannary Law developed from three sources:

“...Cornish, Anglo-Saxon and Norman. The customary Cornish Law became amalgamated with the Customary Law of the Anglo-Saxons which Norman law then tolerated.”<sup>16</sup>

Dr John Rowe stated simply Stannary Law had as one of its origins Celtic customary law<sup>17</sup>.

The body of customary law was supplemented by enactments of the Convocations of Tinnars of Cornwall. In addition there were the Acts of the Westminster Parliament, for example, the Stannaries Act 1641, parts of which the Stannary Courts simply ignored; the Stannaries Courts Act 1836, which extended the jurisdiction of the Stannary Courts to matters connected with all Metals and Metallic Minerals in Cornwall in the same way as previously applied to tin; and the Stannaries Courts (Abolition) Act 1896 (as amended by the Constitutional Reform Act 2005<sup>18</sup>) which abolished the last Stannary Courts and transferred its jurisdiction. The abolition brought to end:

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<sup>13</sup> Lewis, G R., *The Stannaries: A Study of the Medieval Tin Miners of Cornwall and Devon* (1908) p 108

<sup>14</sup> Resolution of Judges 1608 (See Appendix D for full text)

<sup>15</sup> Pennington, R., *A History of the Mining Law of Cornwall and Devon* (1973) p 9

<sup>16</sup> Pennington, op. cit. p 13

<sup>17</sup> Rowe, op. cit. p 195

<sup>18</sup> Constitutional Reform Act 2005 Schedule 4 section 17

“..the last remnant of a whole way of life in a county, or perhaps more accurately, country.’’<sup>19</sup>

Like English law Stannary law was based on precedent. Decisions of lower Stannary Courts were bound by decisions of higher Stannary Courts. Finally and significantly there were the various Charters which are set out in Appendix D.

### The Charters

The foundation upon which rests the rights and privileges of the Stannaries are the Charters as follows:

Charter of Liberties to the Tinnars of Cornwall and Devon (1201);  
Charter of Liberties to the Tinnars of Cornwall (1305);  
Charter of Confirmation to the Tinnars of Cornwall (1402); and  
Grant or Patent of Pardon and Immunities to the Tinnars, Bounders and Possessor of Works of Tin of Cornwall (1508).

There was a minor Charter granted in 1466 which gave certain rights to Cornish Tinnars in the Royal Forest of Dartmoor.

Sir George Harrison states “Those Charters merely confirmed pre-existing rights and privileges even then of ancient date”<sup>20</sup>. Furthermore, he said the Charters of 1201 and 1305 demonstrated:

“..that the system was not only in existence but even at the date of the earliest of those Charters it had, probably for centuries been established on the firm basis of prescriptive usage.”<sup>21</sup>

The 1201 Charter confirmed the ancient privileges of bounding, of fuel and water and removed tinnars from pleas of serfs<sup>22</sup>. No magistrate had jurisdiction over them save their Warden who alone or through his officers might summon them for civil and criminal matters.

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<sup>19</sup> Cruickshanks, E., “The Convocation of the Stannaries of Cornwall” (1986) *Parliaments, Estates and Representation* Vol 6 Part 1 p 67

<sup>20</sup> Harrison, Sir George, *A Report of the Laws and Jurisdiction of the Stannaries* (1835) p 67

<sup>21</sup> *Ibid* p 67

<sup>22</sup> State of being born in bondage or serfdom

The Charter of 1305 partially separated the Devon Stannaries from the Cornish Stannaries. It confirmed the right to bounding, freed tanners from ordinary taxation, confirmed the practice of tin coinage and tried to give precision to the jurisdiction of the Warden.

The 1201 and 1305 Charters, which placed criminal and civil jurisdiction over tanners in the hands of the Warden, resulted in the division of mining districts into several distinct provinces or Stannaries those being Foweymore, Blackmore, Tywarnhayle, Penwith and Kerrier. Each district was presided over by the Warden's representative, a Steward.

The 1305 Charter is the most significant of the charters and provided:

“...that all tanners ..working those Stannaries, shall be free and quit of pleas of natives, and of all pleas and suits in anywise touching the Court of us, or of our heirs so they shall not answer before any justices or ministers of us or our heirs...except for pleas of land and of life and of members..”

It exempted tanners from:

*“..tallages (arbitrary taxes imposed by the king on the tenants of his demesne lands and on boroughs holding royal charters, or by a feudal lord on his tenants) toll (or charges for the use of markets, roads, bridges and other facilities) stallages (charges for the use of a particular place in a market town for the sale of goods) aids (feudal imposts exacted by the kings or a feudal lord from his tenants to assist with occasional heavy expenditure) and other customs whatsoever; in the towns ports fairs and markets within the county aforesaid.”*

It goes on to say:

“....if any tanner transgressed in anything for which they ought to be imprisoned...and in our prison of Lostwithiel and not elsewhere shall be kept and detained....”

In summary by the 1305 Charter “working miners” or “privileged tanners” were not to be brought before the ordinary Courts except upon charges of murder, manslaughter and mayhem. In all other matters tanners were to sue and be sued in Stannary Courts. So one sees, for example, cases of debt, contract, assault and battery, defamation and trespass of

swine amongst other matters being heard before Stannary Courts. Lewis called the 1305 Charter “..the real constitution of the Stannaries.”<sup>23</sup>

### *D The independence of the Stannary system*

It was clearly decided in the leading case of *Trewynard v Killigrew* (1562)<sup>24</sup>, in the reign of Elizabeth I, there was no appeal from the Stannary Courts to the “ordinary Courts” of England. A decision confirmed in Star Chamber in *Trewynard v Roscarrack* (1564)<sup>25</sup> and *Langworthy v Scott* (1616)<sup>26</sup>. As stated by Lord Coke in 1608:

“Appeals first to the Steward of Stannary Court then Under Warden...then to Prince’s Privy Council and not examinable in this Court or any other Court.”<sup>27</sup>

Final appeal within the Stannary system was to the Privy Council of the Duke of Cornwall and then the monarch’s Privy Council. Prince Albert, as Lord Warden of the Stannaries, gave many judgements in cases appealed to the Prince’s Council.

Sir John Dodridge writing in 1650 described the system well:

“In every of which Stannaries, there is a Court, to minister Justice, in all causes personal arising between Tinner and Tinner, and between Tinner and Foreigner; and also the right of ownership of Tin Mines, and the disposition thereof; except in causes of Land, Life and Member: and if in any false and unjust Judgement be given in any of there said Courts, the Party aggrieved may make his Appeal unto the Lord-Warden of the Stannaries, who is their superior Judge, both for Law and Equity; and from him, unto the Body of the Council of the Lord Prince, Duke of Cornwall; to which the Duke the Stannaries are given, as by the former Charters have appeared; and from the Appeal lieth to the King’s most Royal Person”<sup>28</sup>.

### *E Territorial jurisdiction of the Stannaries*

In a Privy Council decision of 1632 it was stated:

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<sup>23</sup> Lewis, op. cit. p 39

<sup>24</sup> *Trewynard v Killigrew* (1562) (4 and 7 Elizabeth I)

<sup>25</sup> *Trewynard v Roscarrack* (1564) (4 Coke’s Institutes 229)

<sup>26</sup> *Langworthy v Scott* (1616) (3 Bulstr 183)

<sup>27</sup> Resolution of the Judges 1608 (See Appendix D)

<sup>28</sup> Dodridge, Sir John, *An Historical Account of the Ancient and Modern State of the Principality of Wales Dutchy of Cornwall and Earldom of Chester* (1630) Dodridge was a Devon lawyer and MP who acted as solicitor-general and a justice of the King’s Bench

“We cannot but discern that the Stannaries extend over the whole County of Cornwall. The exemption of tanners from toll is over the whole county. The power to dig and search for tin is over the whole county..”<sup>29</sup>

In this, Cornwall differed from Devon and other areas which had mining laws. The Stannary system extended over the whole of Cornwall and was not limited to a particular area.

#### *F Who were tanners within the jurisdiction of the Stannaries?*

A “tanner” who could prove he came within the jurisdiction of the Stannaries enjoyed certain rights and privileges. He could only sue and be sued in Stannary Courts. Warrants and writs against tanners from non Stannary Courts were not allowed and officers attempting to serve them were liable to arrest. Only a “tanner” who came within the jurisdiction of the Stannaries, a “privileged tanner”, could claim the benefits of the Charters particularly the Charter of 1305. This situation created tensions. Many claimed to be “privileged tanners” to bring themselves within the jurisdiction of the Stannaries. Sir George Harrison, quoting a Charter of Henry VII gives the following example:

“As for *Contywall use*, it appeerth by very mayn instances, that Earles, Lords, Abbotts, other Clergiemen, some Judges, Women, etc., did sue in the Stannaryes as “*Stannatores*”....”<sup>30</sup>

Two questions arose. The first concerned the definition of “tanner”. Did it, as the Stannaries claimed, include not only manual labourers, but their employers, the holders of shares in tin mines, the dealers in tin and in ore, and all the artisan classes connected with tin mining? Or was it to comprise only working miners, and only as long as they remained in work?<sup>31</sup>

Many attempts were made to determine the class of “privileged tanners” who came within the ambit of the Stannaries. The Convocation Act (Cornwall) 1588 section 7 passed by the Convocation of the Tanners of Cornwall declared that:

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<sup>29</sup> Resolution of the Privy Council 1632 – Order 21<sup>st</sup> January 1632 (See Appendix D)

<sup>30</sup> Harrison, op. cit. p 133

<sup>31</sup> Page, W., (Ed.) *The Victoria History of the Counties of England – Cornwall* (1906) p529



“there are two sorts of tinnners, viz, the tin worker, spalliard (*a pickman or working miner*) or pyoner (*a form of adventurer*)...(who) is not to sue or to be sued out of the Courts of Stannary..except (for) matters touching land, life or mayhem”; and

“the second sort of tinner (who) are such as have some part or portion of tinworks, or receive toll tin either as lords or farmers thereof, or do convert (*smelt*) black tin into white tin, or are necessary for getting or obtaining tin, as colliers, blowers, carpenters, smiths, tin merchants and such like intermeddling with traffic of tin...(they) may sue and implead (or) be sued or impleaded in the Stannary Courts.”

The wonderfully named “Act against the divers incroachments and Oppressions in the Stannary Courts”, otherwise the Stannaries Act 1641 passed by the Westminster Parliament stated at section 3 in defining “privileged tinnners”, that the:

“...great liberties do of Right belong to the working Tinner, working without Fraud or Deceit in the Stannaries aforesaid, and not to any other nor elsewhere working..”

and not to those who:

“..for small or no Consideration (have) sought and acquired...decayed tin-works and small and inconsiderable Parts in the same and other tin-works.”

The Stannary Act 1641 also defines, at section 4, a “privileged tinner” “is or shall be working”. The Stannary Courts ignored the Stannaries Act 1641 see, for example, the Stannary Court case of *Tregilgas v Dingey* (1843) in which the Court decided that a shareholder in a tin mining company was a “privileged tinner”. Persuasive legal opinion is that the Stannary Courts had continued to exercise a jurisdiction for over 200 years after that power had been removed from it.

The Stannaries Act 1836 extended the authority of the Stannary Courts providing:

“...all adventurers, agents, labourers connected in any way with mines either supplying materials or otherwise were held to be miners and made to sue or be sued in the Stannary.”

Thus the jurisdiction extended to any mine worked for lead, copper or other metal or metallic mineral or the searching or working smelting or purifying any lead copper or other metallic mineral as fully as with respect to tin or tin mines. It also extended to non-metallic minerals found in the same mine and worked by the same adventurers. So, for example, workers in the china clay industry could be held to be tinnerns see: *Re Treverbyn Trevanion Clay Works* (1872)<sup>32</sup> and *Pearce v Grundy* (1818)<sup>33</sup>. See also the case of *Boscawen v Chaplin* (1536)<sup>34</sup> towards the end of the reign of Henry VIII in which the parties were described as tinnerns who were a:

“..wise man and learned in law of this Realm and a merchant buyer of tin.”

Note also *Trewynard v Killigrew* (1562)<sup>35</sup> in which the parties are said to be “esquires and gentlemen.”

Bainbridge in his “A treatise on the Law of Mines and Minerals” defines “privileged tinnerns” as:

“labouring tinnerns, dressers, smelters and all persons actually employed in tin works” while “all officers of the Court, owners of tin works, adventurers, purchasers of tin, and all other that intermeddle with tin are called ‘tinnerns at large’.”<sup>36</sup>

The “privileged tinner” could only sue or be sued in his own Stannary Court. While tinnerns at large could be sued by “foreigners” (strangers to the Stannaries) in local Courts at the election of the plaintiff. The distinction between a “privileged tinner” and a “tinner at large” was important. Most significantly only a “privileged tinner” could claim the benefits of the Charter of 1305.

## *G Stannary Law – Extent of Jurisdiction*

The system of law governing tin mining was universal in that it related not only to operations and transactions necessarily occurring in the industries but also extended to all aspects of the lives of those who were engaged in tin affairs. The number of people this

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<sup>32</sup> *Re: Treverbyn Trevanion Clay Works* (1872) Reported Royal Institute of Cornwall Gazette 1<sup>st</sup> June 1872

<sup>33</sup> *Pearce v Grundy* (1818) decided by Vice Warden of the Stannaries 7<sup>th</sup> April 1818

<sup>34</sup> *Boscawen v Chaplin* (1536) (Harleian Manuscripts 6380 folio 9)

<sup>35</sup> *Trewynard v Killigrew* (1562) (4 and 7 Elizabeth)

<sup>36</sup> Bainbridge, W., *A Treatise on the law of Mines and Minerals* (1856) p 571

encompassed was substantial. The 1201 Charter provided no magistrate or coroner had jurisdiction except the Warden of the Stannaries who had plenary power “to do them justice, and to hold them to law”.

It is clear from the 1201 Charter the Stannary Courts exercised a criminal jurisdiction otherwise why provide exceptions of “murder manslaughter and mayhem” or “land life and members” sometimes called “life land and mayhem”. The Charters have always been interpreted to mean the exclusion of “land, life and limb” meaning the Lord Warden could not exercise jurisdiction over claims for damages in respect of loss of life or physical injury and could not order capital punishment or mutilation but could order lesser punishments.

The Court rolls record criminal offences of theft, riotous assembly, forcible entry on land, wrongful levying of hue and cry and so on. Lewis gives a graphic description of the cases heard:

“Trespassing with swine and geese on a neighbour’s cornfield, cutting another’s timber, infractions of the size of beer, baking unwholesome bread and, shortly after the Black Death, evasions of the Statute of Labourers. Instances are not lacking of an entire parish being fined for failure to repairs its roads.”<sup>37</sup>

A. L. Rowse gave further examples of the extent of the jurisdiction exercised by the Stannary Courts:

“The sixteenth century saw the jurisdiction of these courts encroaching until all kind of cases, many of them remote from tin matters, came within their purview. For example, Sir Richard Grenville hauled Thomas Hilling before the Stannary Court at Blackmore for slander of his father-in-law St John St Leger.”<sup>38</sup>

The Stannary Courts dealt with, what we would now be regarded as “tort” or civil wrongs. They also dealt with matters of taxation or coinage as it was called. It heard cases which now would come under the heading of “company and commercial”. Disputes about mining including contractual disagreement and arguments about a peculiar form of company unique to Cornwall called a “cost book company” came within the Courts

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<sup>37</sup> Lewis, op. cit. pp 119-120

<sup>38</sup> Rowse, A.L., *Tudor Cornwall* (1941) p. 127

purview. The Stannary Courts exercised an “equitable” jurisdiction a prerogative right originating from the monarch.

### Strode’s Case

A demonstration of the independence of the Stannary Courts is shown by *Strode’s Case*<sup>39</sup>. Richard Strode, a Member of Parliament, introduced a Bill in Westminster in 1512 to change the working conditions of Tinnars in Devon which was deemed to be in breach of a Stannary ordinance of September 1510. As a consequence he was successfully prosecuted in the Stannary Courts. Strode was fined and imprisoned for three weeks in Lidford Stannary Jail. As a consequence the Privilege of Parliament Act 1512 was passed, voiding the proceedings and all suits etc for the future “..for any bill, speaking, reasoning, or declaring of any matter or matters concerning the Parliament” and it was afterwards resolved by both Houses that this extended to all members in all Parliaments.

Parliamentary privilege has its origins in a case in which a Stannary Court exercised its jurisdiction which required an Act of Parliament to reverse its decision.

### *H Bounding*

Lewis in his study described “the solemn mystery of the art of bounding”<sup>40</sup> as:

“...freely searching for tin wherever it might be suspected regardless of the rights of the landlord..”<sup>41</sup>

The 1305 Charter provided:

“We have granted also the said tinnars that they may dig tin, and turves to melt tin, anywhere in the lands, moors, and wastes of us, and of others whosoever; in the county aforesaid, and divert water and water courses for the works of the Stannaries aforesaid..”

The Victoria History of the Counties of England of 1906 explained:

“Cornish Law, after excluding highways, houses, and churchyards from devastation, allowed any man to dig for tin in all wastrel, (*Terris vastis et moris* -

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<sup>39</sup> *Strode’s Case* (1512) (1 Hats. 86) (Howell’s State Trials 294 309-310) See also History of Parliament Online <http://historyofparliament.org/volume/1509-1558/member.strode-richard-i>

<sup>40</sup> Concanen, G., *A Report of a Trial at Bar Rowe v Brenton* (1830) p xxxiv

<sup>41</sup> Lewis, op. cit. p 35

*1305 Charter – wastrel lands and moorland*), and in enclosed lands, if the latter were of the duchy manors, or had been anciently bounded and assured for wastrel. Anywhere else the owner's consent was required.”<sup>42</sup>

Possibly the most succinct description is given in Halsbury's Laws of England:

“The ownership of a mine vests prima facie in the owner of the freehold. This right is, however, modified by the custom of tin bounding. The custom has fallen into disuse, but it has never been abrogated. Under the custom, if a tin mine lay within waste land or certain inclosed land and was not worked by the surface owner, a tinner could claim and, if various conditions were met, be granted tin bounds. The grant carried the exclusive right to search for and work all tin and tin ore within the bounds, subject to a payment to the owner of the soil.”<sup>43</sup>

There was a set procedure which involved corner bounds or side bounds. Bounds are required to have four corners and to be defined by twenty four turfs or stones, six to each corner. Every bounder is required to proclaim at the next Stannary Court (now Truro County Court) the date of his possession, names of his partners and the person who cut the bound and the limits. The same proclamation must be made in the two following Court sessions. Three months' notice in writing prior to cutting must be given to the owner of the soil who may then choose to cut bounds. Bounds must be annually renewed and must be worked. If a miner successfully bounded land he acquired a right against the lord and it was that right which was commonly called bounds.

Despite what is said in Halsbury's, as quoted above, tin bounding continues in Cornwall.

## *I Coinage*

A tax known as 'coinage' and said to have been in existence since 1198, was paid on all smelted tin. It was ended by Cromwell and re-introduced by Charles II. Coinage became more elaborate and complicated over the years and was finally abolished by Act of Parliament in 1838<sup>44</sup>. It was felt, at the time, that it was impossible to leave the Stannaries saddled with Coinage Duties in view of the fact the customs duty on imported

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<sup>42</sup> Page, op. cit. p 526

<sup>43</sup> Halsbury's Laws of England Mines Minerals and Quarries (Volume 31) section 10 para. 589

<sup>44</sup> Coinage Abolition Act 1838

foreign tin was reduced and thus the Stannaries, had lost the benefit of a high protective tariff<sup>45</sup>. There were different rates of coinage levied on tin produced in Cornwall and Devon, for example, in 1198 it was five shillings for every thousand weight of tin in Cornwall while in Devon it was 30 pence<sup>46</sup>. The Duke received an annuity of £16,216 15s 0d (approx £1.1 million in 2011) in exchange for surrendering his coinage duty. No allowance was made for inflation and the figure remained unchanged until 1983 when it was abolished<sup>47</sup>. Coinage was payable at 'coinage towns': Lostwithiel, Liskeard, Truro, Helston, Bodmin and Penzance.

The Duke also had the right to purchase all tin, or pre-emption, which was only rarely exercised.

## *J      The Convocation of the Stannaries of the Duchy of Cornwall* *(The Tinnars Parliament)*

### Introduction

The Convocation of the Stannaries of Cornwall, from now on the Convocation, was (*and, arguably, remains*) a remarkable institution. It did not make Cornwall unique: Devon also had a Parliament (called the Great Courts or Parliament of the Devon Tinnars) as did the lead miners of Derbyshire and the miners of the Mendip Hills but it did make Cornwall different for the following reasons.

The Convocations of Devon and Cornwall were representative legislatures linked to a single industry<sup>48</sup>. The Convocations were not assemblies concerned with the people of a particular area like, for example, the Scottish or Westminster Parliaments. However the Cornish Convocation could claim to be occupied with a significant portion of the population since the number of people who could claim to be tinnars was very wide.

They were, possibly, an expansion of, and an offshoot from, the grand juries of the Stannary Courts. It is said in some older local histories that until 1305 the tinnars of Devon and Cornwall met in one Parliament on Hingston Hill near Callington; others

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<sup>45</sup> TNA T 38/837 - Civil List Notes (1897)

<sup>46</sup> Concanen, G., *A Report of a Trial at Bar Rowe v Brenton* (1830) p xii

<sup>47</sup> Miscellaneous Financial Provisions Act 1983

<sup>48</sup> Cruickshanks, op. cit. p 59

suggest Crockernton on Dartmoor. After the Charter of 1305 the Parliaments were held separately<sup>49</sup>. The records for Devon date back to 1510 while those for Cornwall to 1588.

Professor Robert Pennington asserted:

“The Parliament of the Convocation of the Tinnars of Cornwall was a unique institution in that it was not only a body representative of a special industrial and commercial sector of the economy, but was also a legislature with powers parallel to those of the Parliament at Westminster and had power to veto legislation by the central government if it affected tin mining. *No other institution has ever had such wide powers in the history of this country.*” (emphasis added)<sup>50</sup>

The remarkable power of veto possessed by the Convocation distinguished Cornwall from other areas, like Devon, who could claim a “miners’ parliament”.

#### The 1508 Charter

The recorded history of the Convocation of Cornwall begins with the Charter of 1508 (See Appendix D) granted by Henry VII. The background to the granting of the Charter is as follows. In 1497 the Cornish rebelled against Henry VII. The immediate causes of dissatisfaction were increases in taxation to finance an unpopular war with Scotland, the suspension of the Stannaries in 1496 and stricter rules being imposed by the then Duke of Cornwall, Prince Arthur, on tin bounding and coinage. There was, initially, an unexpectedly successful march on London led by Michael Angove and Thomas Flamank. However, the rebels were defeated by the King’s forces in Blackheath and the leaders executed. Henry VII was surprisingly moderate in the way he dealt with the uprising, presumably not wishing to make a bad situation worse. A number of pardons were issued and property previously confiscated was restored. Equally significant was the Charter of Pardon:

“....a move clearly designed to win pacification and renewed accommodation of Cornwall not only by restoring the Stannaries (on the payment of a £1000 fine) but also enhancing the constitutional status of the Stannary Parliament. Both the privileges of the tinnars and the legislative capacity of the Parliament....Coming

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<sup>49</sup> Carew, R., *The Survey of Cornwall* (1602) p 16

<sup>50</sup> Laws of the Stannaries - Trevithick Society (1974) Introduction

so soon after the crisis of 1497, this must be seen as a deliberate strategy to restore the constitutional accommodation of Cornwall. The Charter of Pardon extended the definition of tinner (and thus the jurisdiction of Stannary Law) to include almost anyone connected in one way or another with the tin trade..<sup>51</sup>

The Charter provided that the Convocation consisted of:

“...twenty four good and lawful men of the four Stannaries of the county of Cornwall, namely six men from each of the Stannaries elected and appointed from time to time as occasion requires..”

The four Cornish Stannaries were centred on the principal mining districts of (1) Penwith and Kerrier, which comprised Land’s End, the Lizard peninsula and area between Hayle, Redruth and Helston (2) Tywarnhaile which ran from Truro to Penryn in the east and to St. Agnes in the West (3) Blackmore, which corresponded with Hensborrow granite boss and (4) Foyemore which extended over Bodmin moor. Writs would be issued to the mayors of the four “coinage towns” 1) Launceston for Foyemore 2) Lostwithiel for Blackmore 3) Truro for Tywarnhaile and 4) Helston for Penwith. The electorate consisted of the freeholders of each of the Stannaries who elected six Stannators making twenty four in all. Each Stannator was empowered to nominate an Assistant who acted in a consultative capacity and as a link to the free miners. The Devon Stannary towns were Tavistock, Ashburton, Chagford and Plympton.

Convocations of the Cornish Tinnars were held to enact legislation in 1588, 1624, 1636, 1686 to 1688, 1704, 1750 and 1752 to 1753. There was an attempt to arrange a meeting of the Convocation in 1835 and there was some lobbying again in 1865. Neither was successful. The equivalent body in Devon particularly during the Tudor period, met far more frequently and were more active. It last met in 1786.

Henry VII stated that he would ask Parliament to ratify the Charter but he died before he had the chance so to do.

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<sup>51</sup> Payton, P., *Cornwall - A History* (2004) p 115



### The Procedures of the Cornish Convocation

The Convocation would be summoned by the Duke of Cornwall, or if no Duke, by the monarch, whereupon the Lord Warden of the Stannaries issued precepts to the four “coinage towns”, to hold elections for Stannators. The Stannators, as already noted, latterly appointed twenty four assistants, who formed a lower house to assist them and advise on legislation.

The procedure for the Great Court of the Devon Tinnars differed from that of Cornwall. It consisted of ninety six jurates, with twenty four being chosen by each of the Devon stannaries. The jurates were chosen by tinnars which term included miners, tin work owners and others concerned with the tin mining industry.

### The right of veto

The 1508 Charter provides:

“....no statutes, acts, ordinances..or proclamations (*statute, actus, ordinaciones, provisiones, restrictions sive proclamaciones*) made at any time hereafter shall be put into force in the said county (Cornwall) to prejudice or burdening of the said tinnars bounders, possessors of tin works..proprietors of blowing houses..buyers of black or white tin or dealers in white tin or the heirs and successors of any them” unless a Convocation..had been convened and given its consent.”

The right of veto applied to enactments of the monarch in Privy Council, the Duke of Cornwall in the Prince’s Council as well as Acts of the Westminster Parliament. The position, arguably, was and remains that the consent of the Convocation is required before enactments of the Westminster Parliament are passed affecting tin mining, and latterly all mining, in Cornwall.<sup>52</sup>

### Was the right of veto exercised?

It was exercised on at least three occasions. In 1674 there was a dispute between the Convocation and the King because the Convocation refused to delegate its contracting powers to a select committee. In 1687 the Convocation refused to ratify a Royal Contract for pre-emption. The most notable occasion occurred during the reign of James II in 1686 when Letters Patent issued by Charles II appointing Penzance as a coinage town was

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<sup>52</sup> Professor Robert Pennington Letter to Daily Telegraph 15<sup>th</sup> June 1974

nullified. The Cornish Parliament of Tinnars declared they had taken “no Notice” of the order<sup>53</sup>.

## *K Conclusion*

The income from the Stannaries was a significant source of Revenue for the Duchy and when there was no Duke for the Crown. The Duchy’s power over the Stannaries meant it affected a substantial portion of the population of Cornwall. The Duchy’s right to appoint the Sheriff and the Lord Warden of the Stannaries meant it had control, for a period at least, of the government of Cornwall. In the 19<sup>th</sup> Century the Duchy was starting to call itself a “private estate”. It is an unusual “private estate” which has a judicial function as the Duchy did until 1896 when the Stannary Courts were eventually abolished.

## *L Does Stannary Law have any modern application?*

Bridget Prentice MP in reply to a question from Andrew George, M.P. responded:

“On the question about Stannary organisations, there are no valid Cornish Stannary organisations in existence. It is noted that Stannary courts were abolished under the Stannaries Court (Abolition) Act 1896.”<sup>54</sup>

In answer to a further question posed by Mr George Mr Michael Wills, M.P., Minister of State at the Ministry of Justice, stated:

“The body of Stannary customary law has not been systematically repealed. It is likely however that such customary law has been superseded by modern legislation. There were also provisions in 19<sup>th</sup> Century primary legislation relating to the Stannaries but these have largely been repealed.”<sup>55</sup>

More recently on 11<sup>th</sup> May 2011 Lord McNally, Minister of State, Ministry of Justice was answering a question by Lord Laird said:

“Cornwall is subject to UK legislation. While the body of Stannary law has not been systematically repealed, it is likely that such customary law has been superseded by modern legislation.”<sup>56</sup>

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<sup>53</sup> Pearce, T., *The Laws and Customs of the Stannaries of the Counties of Devon and Cornwall* (1725)

<sup>54</sup> HC Written Answers 29<sup>th</sup> March 2007 Column 1673W

<sup>55</sup> HC Written Answers 29<sup>th</sup> May 2009 Column 1451W

<sup>56</sup> HL Written Answers 11 May 2011 Column WA214

The views expressed by Ms. Prentice, Mr. Wills and Lord McNally are open to challenge. One can argue the Convocation of the Tinnars of Cornwall still exists and that Stannary Law indisputably remains part of English Law. In fact, as has been established, Stannary Law, did not, as the answers from Mr. Wills and Lord McNally imply, consist solely of “customary law”: it was also based on Charters, Convocation Acts, Acts of the Parliament at Westminster and precedent.

*R v East Powder Magistrates Court ex parte Lampshire*<sup>57</sup>

On 23<sup>rd</sup> October 1977 Mr Reginald Brian Hambly used a motor vehicle on a public road in St Austell for which a licence under the Vehicle (Excise) Act 1971 was not in force. Mr. Hambly was summoned to appear before the East Powder Magistrates on 15<sup>th</sup> June 1978. The Magistrates decided they had no jurisdiction to hear the case because Mr. Hambly claimed to be a privileged tinner and elected to be tried in the court exercising Stannary jurisdiction. A judicial review was sought by Ms. Lampshire who was an officer of the Motor Taxation Department in Cornwall.

Lord Widgery said:

“....the prosecution accepted (Mr. Hambly) was a “privileged tinner” and the fact the rights of tinnars had been in abeyance did not destroy them..”

“For my part I have found this a simple case because it seems to me that Parliament being supreme and Parliament have enacted..(various Acts)..there can be no conclusion left beyond the fact that the nominees of Parliament – the justices – are put in a position they can try a summary offence of this kind even though committed within the Stannaries.”

Judge Robert Goff said “...the respondent (Mr. Hambly) is a privileged tinner.”

The Judges seem to have accepted that the Stannary Courts had exercised a criminal jurisdiction. That the criminal jurisdiction they had exercised was that of a customary “court leet” whose jurisdiction had lapsed or that various Acts of the Westminster Parliament had displaced that jurisdiction. Thus the case was referred back to the Magistrates for a determination. The decision of the High Court was not appealed and the decision stands that while the Stannaries Courts (Abolition) Act 1896 may have

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<sup>57</sup> *R v East Powder Magistrates’ Court ex parte Lampshire* (1979) (2 All ER 329)

transferred the civil jurisdiction of the Stannary Courts to the County Courts it did not transfer a criminal jurisdiction. The Judges never questioned the 1201 or 1305 Charters and the fact that certain rights were granted to “privileged tinnners”.

*Frederick Richard Albert Trull v Restormel Borough Council (1994)*<sup>58</sup>

Mr. Trull argued he was not due to pay rates because he was a tinner and because the Westminster Parliament had no jurisdiction to enact laws for those within Cornwall which would in any way impinge on the rights or privileges granted to tinnners except with the approval of the “Cornish Parliament”. In any event, he went on, those obligations could only be enforced in Stannary Courts.

Mr Trull’s arguments were rejected. Cornwall was part of the United Kingdom and Mr. Trull was due to pay the rates although it was accepted he was a tinner.

Bounding

It is still possible to bound. Application is made to Truro County Court which will issue appropriate court orders.

Does the Convocation still exist as a legal institution?

The answer, debatably, is yes for the following reasons. The English legal system, unlike that of Scotland, does not generally recognise the principle of “desuetude” by which statutes, legislation or legal principles lapse and become unenforceable by long habit of non-enforcement. There are a number of cases which demonstrate this point, in particular:

*Rex v The Mayor and Jurats of Hasting (1822)*<sup>59</sup>

Despite the fact that one had not been held since 1790 the Mayor was obliged to hold a Court.

*Rex v The Steward and Suitors of the Manor of Havering Atte Bower (1822)*<sup>60</sup>

It was decided the fact that there was non-user for fifty years had not deprived them of the power of holding a Court for the recovery of debts.

The side note of the report of the case says:

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<sup>58</sup> *Frederick Richard Albert Trull v Restormel Borough Council* (1994 WL 1062112)

<sup>59</sup> *Rex v Mayor and Jurats of Hastings* (1822) (1 Dowl & Ry. 148)

<sup>60</sup> *Rex v Steward of Havering* (1822) (2 Dowl. & Ry 176n)

“Held that this Court being for the public benefit, the words of permission in the charter were obligatory; and that the right of determining suits was not lost by non-user.”

*Rex v The Mayor and Corporation of Wells (1836)*<sup>61</sup>

The particular Court in question on this occasion had not been held for two hundred years. There were no funds for holding the Court and no one knew the procedures. Patteson J, the Judge to whom the Cornwall Foreshore dispute was submitted, said:

“I do not think I have any discretion on the subject. The power to hold this Court being granted by the charter, I do not think that the corporation can lay it aside merely on the grounds of want of funds; as to length of time, I cannot distinguish between fifty-two years in the case cited and two hundred.”

*Attorney General of the Isle of Man v Cowley and Kinrade (1859)*<sup>62</sup>

It was stated:

“Where any Court lawfully possesses a jurisdiction for the benefit of the subject in the administration of justice, it is settled that mere non user does not take it away.”

*Manchester Corporation v Manchester Palace of Varieties (1955)*<sup>63</sup>

The issue which arose involved the use or misuse of a coat of arms. It was heard in front of the High Court of Chivalry which has absolute jurisdiction in such matters. The fact the Court had not sat for two hundred years was no bar to its sitting. It is clear should a similar case arise in the future the Court could again sit.

*Attorney General v H.R.H. Prince Ernest Augustus of Hanover (1957)*<sup>64</sup>

The matter arises from the Princess Sophia Naturalization Act 1705. Prince Ernest Augustus sought a declaration he was a British subject by virtue of the legislation. Initially the High Court held that the statute though perhaps not obsolete, was entirely spent. The Court of Appeal held the enacting words were plain and unambiguous;

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<sup>61</sup> *Rex v Wells Corporation* (1836) (4 Dowl. 562)

<sup>62</sup> *Attorney General of Isle of Man v Cowley and Kinrade* (1859) (12 Moore PCC)

<sup>63</sup> *Manchester Corporation v Manchester Palace of Varieties Ltd* (1955) (2 WLR 440 1955) (1 All ER 387)

<sup>64</sup> *Attorney General v HRH Prince Ernest Augustus of Hanover* (1957) (AC 436) ((2 WLR 1 1957)

“..that the fact by virtue of the passage of time since the statute was enacted the enacting words on their plain construction might lead to absurd and inconvenient results was no reason why the court should depart from the ordinary canons of construction.”

The decision of the Court of Appeal was upheld by the House of Lords.<sup>65</sup>

### Summary

There are, based on the precedents quoted above, convincing arguments that the Convocation still exists as a legal institution and could be summoned.

### Has the right of veto been withdrawn?

Dafydd Wigley M.P. on 3 May 1977 asked the Attorney-General the following question:

“..on what date and by what enactment the provisions of the Charter of Pardon of the twenty-third year of the reign of Henry VII was rescinded or amended in relation to the Stannaries of Cornwall.”

The Attorney General replied:

“My noble friend is making enquiries into this matter and will be writing to the Hon. Member.”<sup>66</sup>

Mr Wigley received a reply from the Lord Chancellor, Lord Elwyn Jones, dated 14<sup>th</sup> May 1977 which did not directly answer the questions raised. The Lord Chancellor quoted from Professor Robert Pennington’s Book<sup>67</sup> “Stannary Law” in which Pennington pointed out that Henry VII promised to have the Charter ratified by Act of Parliament but died before he could do so. Pennington suggested in his book that the question is in abeyance as to whether the Convocation could veto a Westminster Act of Parliament. It was also noted by the Lord Chancellor no doubt had ever been expressed about Parliament’s power to enact legislation for the Stannaries without consent of the Convocation of the Tinnars of Cornwall. The Lord Chancellor then went on to say that: “no record would be noted against the original of any subsequent rescission or amendment.”

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<sup>65</sup> For more on this see Lyon, Ann., “For he is an Englishman” (1999) Statute Law Review Volume 2 pp 174 - 184

<sup>66</sup> HC Deb 3 May 1977 vol. 931 cc 114-5W

<sup>67</sup> Pennington, Prof. R., *Stannary Law* (1973)

### Vetoing a Bill of the Westminster Parliament

It is a principle of English Law that the Courts did not hold an Act of Parliament ineffective once it had been passed. The view of the Courts is they are not competent to question the regularity or propriety of an Act of Parliament once it is on the Statute Roll. So once an Act of Parliament had been passed it is possible that the Cornish tin interests have no legal redress before a Court despite a breach by the Crown of its obligations embodied in the 1508 Charter. However if a Bill were to be introduced into Parliament which affected the Cornish tin mining industry the Convocation could, arguably, be summoned to exercise its veto.

The opinion of Professor Pennington, expressed in a letter to the Daily Telegraph in 1974 was that:

“..it will undoubtedly be possible for interested Cornishmen to obtain a Court order directing the Duke of Cornwall and the Lord Warden to hold a Convocation to discover whether Cornwall consents..”<sup>68</sup>

to a Bill which would affect the tin mining interests.

The Ministry of Justice in a letter to the writer asserted as follows:

“Notwithstanding any ancient prerogative instruments such as medieval Royal Charters, the United Kingdom Parliament is sovereign and in our view may legislate for the Stannaries without the assent of the former Stannary Parliament.”<sup>69</sup>

The Ministry also said:

“Although the Stannary Parliament has not been “abolished” by a formal set of legislation consideration of relevant cases by District Judge Duncan Adams some years ago suggest any rights of the Stannary Parliament had been superseded by all modern laws. The United Kingdom Parliament is the supreme legislative authority and has the power to repeal or modify any earlier statute or legislative instrument.”

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<sup>68</sup> Professor Robert Pennington letter to Daily Telegraph 24<sup>th</sup> May 1974.

<sup>69</sup> Letter to writer from Ministry of Justice 28<sup>th</sup> August 2008

When a request was made to see the papers relating to the consideration of District Judge Adams the Ministry replied it did not have them. Enquiries suggest the Ministry of Justice is referring to a case in 2001 in Truro County Court whose records are not available.

### *M     The Revived Cornish Stannary Parliament*

On 20<sup>th</sup> May 1974 a group of individuals gathered in Lostwithiel in Cornwall and claimed to be the revived Cornish Stannary Parliament. They wrote to the Queen stating if she did not recognise the Parliament they would seize all Crown lands and properties. They invited the Stannary towns to elect Stannators to the revived Parliament which those towns declined to do.

#### Operation Chough

The most notable campaign undertaken by the Revived Cornish Stannary Parliament was in 2000.<sup>70</sup> They wrote to English Heritage ordering them to remove signs bearing that title from sites in Cornwall. When this did not happen the signs were removed and a letter was written to English Heritage as follows:

“The signs have been confiscated and held as evidence of English cultural aggression in Cornwall.”

The individuals concerned with the removal were initially accused of theft under the Theft Act 1968. That charge was subsequently changed to “conspiracy to commit criminal damage” under the Criminal Damage Act 1971. There was a preliminary hearing at Truro Crown Court before Judge Rucker to deal with various procedural matters. The Judge, at that stage, gave his opinion that the case “..has all the makings of a grotesque waste of public money..” As a consequence of complaints by the Defendants about what they regarded as prejudicial comments Judge Rucker was forced to withdraw from the case. All three of the counsel originally instructed by the defence and having accepted the brief found that they had compelling reasons to withdraw before the matter came up for trial.

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<sup>70</sup> For a more detailed explanation, at least from the point of view of the Defendants see <http://www.cornishstannaryparliament.o.uk/justice.html>



The substantial hearing was set down for hearing on 18<sup>th</sup> January 2002<sup>71</sup>. The defendants had prepared their defence which included the argument that for laws affecting the interest of tinnerns, under the Charter of Pardon 1508 the consent of the Cornish Stannary Parliament must have been given. Within ten minutes of the trial commencing, a Public Interest Immunity Certificate was presented by the Crown Prosecution Service. (Public Interest Immunity is a doctrine of the law of evidence whereby the State may seek to withhold otherwise discloseable and relevant evidence from production in court on the grounds that to disclose the evidence would be damaging to the public interest. It is a legal immunity from the usual rules of evidence that compel disclosure and allow for discovery – an immunity originally granted to the Crown as guardian of the public interest<sup>72</sup>.) The defendants agreed to be bound over to keep the peace, return the signs and pay compensation in return for which the charge of “conspiracy to cause criminal damage” was dropped.

The solicitors for the defendants, a large and highly reputable firm, asserted that all the circumstances together “..offer compelling evidence of political interference with the course of justice.” They went on to say:

“It is strongly suspected that the hand of the Duchy of Cornwall is the most likely source for the unconstitutional abuse of power in its unpublicised role as the government of Cornwall.”<sup>73</sup>

## *N Conclusion*

It is clear that while the Stannary Courts were abolished Stannary Law was not. While much of Stannary Law may not have any modern relevance there are parts which remain and are capable of application.

The right to “bound” can still be exercised and is from time to time. It remains possible to demonstrate that a person is a “privileged tinner” although the full extent of that term has not been explored recently. It can certainly be legitimately argued that, for example, clay mine workers are “privileged tinnerns”.

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<sup>71</sup> *Regina v Ernest Nute and others* (2002) (Case No T20010073)

<sup>72</sup> Tomkins, A., “Crown Privileges” in Sunkin, M., and Payne, S., *The Nature of the Crown* (1999) p 191

<sup>73</sup> Private letter from Defendants solicitor dated 3 January 2002

As for the Convocation of the Tinnars of Cornwall there are many who misunderstand its application. It was a body which represented an industry not a population within a territory although the number of people who were engaged in that industry was significant. It extended, unlike the Devon Stannary Parliament, over the whole of Cornwall. It had the extraordinary right of veto which does differentiate Cornwall's Tinner's Parliament from similar bodies. Its methods of election by the standards of today are hardly democratic. However, it continues to have a resonance for some within Cornwall. An argument can be constructed that it still exists as a "legal institution" although that will become more and more difficult to sustain as time passes. If a case can be maintained that the Convocation of the Tinnars of Cornwall exists then exactly the same logic would apply to the Devon Convocation. However the question is not one of law it is one of politics. It is difficult to visualise a situation in which the Duke of Cornwall would summon either Convocation. It is equally unlikely that an individual would seek an order from the Courts obliging the Duke to summon the Convocation and that the Court would grant such an order. Although if such a case were mounted it would be a fascinating hearing.

## **PART 2**

### **The Present Status of the Duchy of Cornwall**



## Chapter 6

### The Management and Legal Status of the Duchy of Cornwall

*“The Duchy of Cornwall is a well-managed private estate...”<sup>1</sup>*

#### A Introduction

This Chapter sets out how the Duchy of Cornwall is managed including the provisions for oversight by the Treasury. The Duchy states that: “Dukes of Cornwall have traditionally managed their own estates” and that: “The current Duke is actively involved in the running of the Duchy..” It also states that “the Prince has helped increase the Duchy’s capital value by 80% in the last six years”<sup>2</sup>

#### B The Prince’s Council

First established by the Black Prince in 1343 it has certain statutory powers<sup>3</sup>. Its members hold office at the pleasure of the Duke of Cornwall but, in practice, are appointed for a term of years. The Duke is Chairman but the Lord Warden of the Stannary deputises in his absence. It is a “non-executive body which provides advice to His Royal Highness with regard to the management of the Duchy.”<sup>4</sup> Typically it meets twice a year. It is described as the “board” of the Duchy under whose “overall guidance” the management of the Duchy operates.

#### C The Officers of the Duchy of Cornwall

The Officers usually appointed, some under statutory authority, are:

The Lord Warden of the Stannaries in Cornwall and Devon who acts as Deputy Chairman of the Prince’s Council and Chairman when there is no Duke of full age;

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<sup>1</sup> Duchy of Cornwall Web site <http://www.duchyofcornwall.org/faqs.htm>

<sup>2</sup> *Ibid*

<sup>3</sup> Duchy of Cornwall Act 1844 section 36 (power to fix fees for inspection of enrolments), Duchy of Cornwall Management Act 1863 section 12 (authorisation for payments from capital accounts) and section 16 (power of attorney to authorise transfer of stock)

<sup>4</sup> Duchy of Cornwall web site op. cit.

The Attorney General to the Prince of Wales (or, if there is no Prince, the Duchy of Cornwall) who is the principal legal officer and in whose name legal proceedings are taken and defended<sup>5</sup>;

The Receiver General appointed under statutory authority<sup>6</sup> who has oversight of the financial affairs of the Duchy; and

The Keeper of the Records also appointed under statute<sup>7</sup> who is normally also the Secretary although the offices are technically separate. (Usually referred to as the Secretary and Keeper of the Records – the Chief Executive Officer of the Duchy<sup>8</sup>.)

Mr. Walter Ross (now Sir Walter Ross), Secretary and Keeper of the Records stated on 7<sup>th</sup> February 2005 in response to a question from a House of Commons Committee:

“The Prince’s Council is purely advisory and at the moment these appointments are made by the Prince of Wales because he goes to senior members of industry to give him advice on the areas that he regards as particularly relevant to the Duchy of Cornwall. They cover finance, law, environment, Cornwall in particular, the tenant farmer and other such issues relating to our business.”<sup>9</sup>

The officers retain their offices for six months after a demise of the Crown or descent of the Duchy but it is presumed that they may be removed during that period<sup>10</sup>

### Proper Officers

Some of the Officers, called “Proper Officers”<sup>11</sup>, have statutory powers conferred on them. For example, the Receiver General is answerable for ensuring payment of advances for improvements<sup>12</sup>; the Keeper of the Records is responsible for payments of proceeds of sale into the capital account<sup>13</sup> and as defendant in specific performance suits<sup>14</sup>. The

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<sup>5</sup> Stannaries Act 1855 Section 31

<sup>6</sup> Duchy of Cornwall Management Act 1863 section 8

<sup>7</sup> Duchy of Cornwall Management Act section 4 and 31-33 and 34 and section 2 Duchy of Lancaster and Cornwall (Accounts) Act 1838

<sup>8</sup> Duchy of Cornwall website: [http://www.duchyofcornwall.org/managementandfinances\\_structure.htm](http://www.duchyofcornwall.org/managementandfinances_structure.htm)

<sup>9</sup> House of Commons – Committee of Public Accounts – The Accounts of the Duchies of Cornwall and Lancaster – 7 February 2005 HC 313

<sup>10</sup> Demise of the Crown Act 1727 section 7 (amended by the Statute Law Revision Act 1948)

<sup>11</sup> Duchy of Lancaster and Cornwall (Accounts) Act 1838 section 2 (as amended by Duchy of Cornwall Management Act 1982 section 9(1))

<sup>12</sup> Duchy of Cornwall Management Act 1863 section 8

<sup>13</sup> Duchy of Cornwall Management Act 1863 section 3

Lord Warden represents the Duke for the purposes of the Inclosure Act 1845 and the Secretary for the purposes of the Landlord and Tenant Act 1954, Rent (Agriculture) Act 1976 and the Rent Act 1977. The Proper Officers are “responsible for preparing the Proper Officers’ Report and the financial statements in accordance with applicable law and regulations”<sup>15</sup>. They are also accountable for the maintenance and integrity of the Duchy’s website<sup>16</sup>.

#### Officials and advisers

In addition to the Officers of the Duchy of Cornwall there are other officials and advisers. Some of these positions are statutory, they include:

The Auditor who has statutory functions;<sup>17</sup>

The Solicitor for the Affairs of the Duchy appointed under section 31 of the Stannaries Act 1855, who represents the Duke of Cornwall in the administration of *bona vacantia*;

The Deputy Secretary and Keeper of the Records who has practical responsibility for delegated administration<sup>18</sup>;

The records clerk;

The property services manager formerly clerk surveyor;

The Deputy Receiver who handles daily financial matters on behalf of the Receiver General; and

Land Stewards’ who manage the districts in which the Duchy lands are administered.

The Comptroller and Auditor General (The National Audit Office) has no right of access to the underlying books and records of the Duchy of Cornwall. The Duchy takes the view that:

“....any estate of business that is private should be able to choose its own auditors.”<sup>19</sup>

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<sup>14</sup> Duchy of Cornwall Management Act 1863 section 34

<sup>15</sup> Duchy of Cornwall Annual Report and Account 31<sup>st</sup> March 2010 page 14

<sup>16</sup> Duchy of Cornwall Annual Report and Account 31<sup>st</sup> March 2010 page 14

<sup>17</sup> Duchy of Cornwall Management Acts 1863 to 1982

<sup>18</sup> Duchy of Cornwall Management Act 1863 sections 4, 32 (as amended)

<sup>19</sup> House of Commons – Committee for Public Accounts – The Accounts of the Duchies of Cornwall and Lancaster - 7 February 2005 HC 313

This is an interesting echo of a statement contained in a memorandum dated 12th March 1936 saying: “What is essential is to keep out audit by the Comptroller and Auditor-General.”<sup>20</sup> It cannot be claimed of the Duchy that it is inconsistent.

### *D Treasury Control*

The Treasury deals with relations between the Duchy of Cornwall and government, and certain specific powers and responsibilities in relation to the Duchy have been conferred on that Department. The Treasury lays before Parliament the accounts of the Duchy and can direct the form of those accounts.

In determining whether to approve any transactions the Treasury applies three statutory criteria:

- (i) whether it is in the interest of the present and future possessors of the Duchy?
- (ii) is it in the interests of the inhabitants of the Duchy?; and
- (iii) whether what is proposed is conducive to the good management of the Duchy?<sup>21</sup>

The sanction and approval of two or more Treasury Commissioners is required before powers conferred by the Duchy of Cornwall Management Act 1863 can legally be exercised in respect of:

- 1 sales, disposals, charges or arrangements by way of compromise of, upon or concerning Duchy of Cornwall possessions;
- 2 repurchases, or redemptions of an annual sum reserved or made payable on any such sales disposal or enfranchisement;
- 3 purchases except where consideration does not exceed a specified sum, presently £500,000; and
- 4 application of capital money for improvements.

The sanction may be with or without restrictions or conditions as the Commissioners think fit.

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<sup>20</sup> TNA T 171/331 – Select Committee on the Civil List (1936)

<sup>21</sup> House of Commons Committee of Public Accounts Report: The Accounts of the Duchies of Lancaster and Cornwall Nineteenth Report of Session 2004-5 HC 313, see also Duchy of Cornwall Management Act 1863 sections 7(3) and 8



The Duke of Cornwall may dispose of by way of absolute sale or a disposition for a limited period any part of the possessions of the Duchy of Cornwall subject to Treasury consent. Similarly Duchy property may be charged assuming Treasury agreement is obtained.

Accounts of the receipts and disbursements of the Duchy of Cornwall must be submitted annually to the Treasury by the Proper Officers of the Duchy in the form and with the explanations required by the Treasury. This annual account must be presented by the Treasury to both Houses of Parliament not later than 30 June following the end of the year for which they are made up<sup>22</sup>. The accounts of the Duchy are to be audited by its auditor or one or more of its auditors and it is their duty to report on the accounts to the Duke of Cornwall. As already noted the National Audit Office does not audit the Duchy Accounts because “it is a private estate not a publicly owned entity”<sup>23</sup>.

The importance of the control by the Treasury cannot be underestimated. Mr Ross said during the House of Commons Committee on Public Accounts on 7<sup>th</sup> February 2005:

“...the governance of the Duchy is very much controlled by the Treasury..

We meet them on the basis of every month..

..we operate within the strict investment criteria that we have to satisfy in dealing with HM Treasury..”

In evidence in a recent case before the First Tier Tribunal (Information Rights) Sir Walter Ross indicated that the response he gave in 2005 was not altogether accurate. Meetings did not take place quite as frequently as he had indicated but there was close contact between the Duchy and the Treasury. He said the Treasury had never refused to agree to a transaction which the Duchy wished to undertake. Furthermore, since the Duke of Cornwall is regarded by the Duchy as being the legal owner of the Duchy the Treasury acted as “quasi trustee” providing the oversight common in more typical trust arrangements<sup>24</sup>.

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<sup>22</sup> Duchy of Lancaster and Cornwall (Accounts) Act 1838 section 2

<sup>23</sup> Duchy of Cornwall Website

[http://www.duchyofcornwall.org/managementandfinances\\_finances\\_oversight.htm](http://www.duchyofcornwall.org/managementandfinances_finances_oversight.htm)

<sup>24</sup> *Kirkhope v Information Commissioner and National Archive* (2012) (EA/2011/0185) Evidence Sir Walter Ross, Secretary and Keeper of the Records Duchy of Cornwall, confirmed by Sir Michael Peat, previously Principal Private Secretary to the Prince of Wales 7<sup>th</sup> February 2012.

### *E Management during vacancy*

When there is no Duke of Cornwall the Monarch may, by Warrant under Sign Manual, authorise so many of the Regular Officers of the Duchy of Cornwall, or any other persons being not less than three or more than five in number as seems fit, to exercise in his or hers name and on his or hers behalf the powers, privileges and authorities in relation to the Duchy vested in him or her<sup>25</sup>.

### *F Management during the minority of the Duke of Cornwall*

In accordance with the Duchy of Cornwall Management Act 1863 as amended by the Family Law Reform Act 1969, during the period when the Duke is a minor (now defined as under age 18) the Duchy is managed on his behalf by a person nominated by the sovereign<sup>26</sup>.

### *G The Duchy a legal entity?*<sup>27</sup>

It is said in Halsbury's Laws of England:

“The Duchy of Cornwall is not as such a *legal person*. Lands and other property are described as “possessions of the Duchy of Cornwall”, which may be *understood as an institution without separate legal personality*.” (emphasis added)<sup>28</sup>

The Information Commissioner contended that the Duchy is “not a separate legal person, instead it is a portfolio of assets that are placed within a private individual's possession.”<sup>29</sup>

There are problems with the analysis contained within Halsbury's Laws and that of the Information Commissioner. The issue has now been considered by the First Tier Tribunal General Regulation Chamber (Information Rights) in the case of *Bruton v Information*

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<sup>25</sup> Duchy of Cornwall Management Act 1863 to 1893

<sup>26</sup> Duchy of Cornwall Management Act 1863 section 38, Family Law Reform Act 1969 section 10(3)

<sup>27</sup> I am indebted to Joseph Barrett Barrister of 11KBW Chambers for sharing the fruits of his research with me.

<sup>28</sup> Halsbury's Laws of England Volume 12(1) para. 320

<sup>29</sup> Letter to Michael Bruton from Information Commissioner dated 5<sup>th</sup> October 2010 Case Reference FS50259426

*Commissioner, The Duchy of Cornwall and the Attorney General to H.R.H. the Prince of Wales*<sup>30</sup> which decided as follows:

- 1 The Duchy is an entity created by Act of Parliament;
- 2 The Duchy exists independently of the persons who from time to time are Dukes of Cornwall. There is always a Duchy although there may not be a Duke;
- 3 The Duchy is managed by the Prince's Council subject to H.M. Treasury oversight;
- 4 The Duchy is managed by Officers appointed under statutory authority;
- 5 The Duchy owns property and enters into contracts on its own account e.g. employment contracts, insurance contracts and leases;<sup>31</sup>
- 6 Statute has empowered the Duchy as a legal entity to enter into banker-customer relationships and to open and maintain bank accounts;<sup>32</sup>
- 7 The Duchy is party to litigation on its own account;<sup>33</sup>
- 8 It is extensively referred to in legislation and a distinction is drawn between the legal entity that is the Duchy and the property of the Duchy;<sup>34</sup>
- 9 The Memorandum of Understanding issued by the Royal Trustees confirms that the Duchy owns Highgrove<sup>35</sup>; and
- 10 The Duchy is registered as an entity with the Information Commissioner under the Data Protection Act 1998.

The Duchy Accounts of 1997 said:

*“The property and other assets of the Duchy and the proceeds of any sale of assets belong to the Duchy...the Duke of Cornwall is only entitled to the net income of the Duchy...”* (emphasis added)

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<sup>30</sup> *Michael Bruton v Information Commissioner, The Duchy of Cornwall and the Attorney General to HRH the Prince of Wales* (2011) EA/2010/0182

<sup>31</sup> Duchy of Cornwall Management Act 1863 section 34

<sup>32</sup> Duchy of Cornwall Management Act 1982 section 6

<sup>33</sup> Duchy of Cornwall Management Act 1863

<sup>34</sup> See for example Duchy of Cornwall Management Act 1982 section 227, Planning Act 2008 and Wildlife and Countryside Act 1981

<sup>35</sup> Report of the Royal Trustees 11 February 1993 HC464

The Duchy nine years later said the effect of the Charter creating the Duchy and subsequent Acts of Parliament is to place the “Duchy’s assets in trust for the benefit of the present and future Dukes of Cornwall..”<sup>36</sup> The 2012 Accounts repeat that statement.

The Duchy challenged the analysis set out on behalf of Mr Bruton:

- A The Attorney General to the H.R.H. the Prince of Wales said “The Charter created something similar to a strict settlement under the Land Settlement Acts.”;<sup>37/38</sup>
- B The use of the term “Duchy” distinguishes between the income generating organisation and the income spending organisation. It is convenient shorthand;
- C There are no words of incorporation in the 1337 Charter;
- D Land is registered in the name of the Duke of Cornwall and tenancies are granted in his name;
- E Legal provision was necessary for the Duchy to open bank accounts because it was not a legal entity;
- F Litigation in relation to the Duchy is undertaken in the title of the Attorney General to the Prince of Wales;
- G Parliamentary draftsmen in legislation in referring to the Duchy are using shorthand as Duke for the possessor of the Duchy; and
- H Duchy accounts are not legal documents only a label is being used.

The Tribunal, whose decision is being appealed by the Duchy, in a unanimous decision found the Duchy to be a body or other legal person. The Duchy argues that the Duke of Cornwall is the legal owner of the Duchy property as, in effect, trustee. He is entitled to the income but he also has an obligation to those Dukes and others who will succeed him. They argue that the Duchy is not liable to tax because it is not a structure recognised by

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<sup>36</sup> Duchy of Cornwall Accounts 2006

<sup>37</sup> Before 1996 and the passing of the Trusts of Land and Appointment of Trustees Act 1996 where land was settled on trust for people in succession (i.e. W for life, remainder to R for life, remainder to S absolutely) a Settled Land Act 1925 settlement arose. Under the legislation the legal estate in the land must be settled in the tenant for life who had full powers of sale and limited powers of leasing and mortgaging and whose powers cannot be ousted, curtailed or hampered in any way. The tenant for life was “king of the castle” but purchase money must be paid to the Settled Land Act trustees if the purchasers are to obtain a good title. (Hayton, D.J., *The Law of Trusts* Sweet and Maxwell 1998 page 41)

<sup>38</sup> See also Bartlett, R. T., “Taxation of the Royal Family – II” (1983) *British Tax Review* Vol 3 p 144

legislation, it is not a natural legal person or a corporate body. Although it has many similarities with a trust it is not a trust<sup>39</sup>.

### Duchy of Cornwall – A Corporation Sole?

There is no authority for the proposition, but it has been suggested that the Duchy is a “Corporation Sole”<sup>40</sup>. The definition contained with Halsbury’s Law would appear to lend support to the proposition. It says:

“A corporation sole is a body politic having perpetual succession, constituted in a single person, who, in right of some office or function, has a capacity to take, purchase, hold and demise real property, and now, it would seem, also to take and hold personal property, to him and his successors in such office for ever, the succession being perpetual, but not always uninterruptedly continuous; that is, there may be, often are, periods in the duration of a corporation sole, occurring irregularly, in which there is a vacancy, or no one in existence in whom the corporation resides and is visibly represented.”<sup>41</sup>

### *H Conclusion*

The Duchy of Cornwall insists it is a private estate despite the fact it was established by an Act of Parliament and is required to submit accounts for Parliamentary oversight. It must seek Treasury approval before it can undertake certain transactions and many of its Officers have statutory functions conferred upon them.

The Duchy is a unique creation, of that there is no doubt and that does raise questions over its legal personality. It is fundamental to a proper understanding to appreciate that the Duchy and the Duke are distinct. There is always a Duchy there may not be a Duke. Similarly when there is no Duke the Duchy remains distinct from the Crown. It is easy to confuse the Duke with the Duchy but that is to make a basic mistake.

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<sup>39</sup> *Kirkhope v Information Commissioner and National Archive* (2012) (EA/2011/0185) Evidence Sir Michael Peat previously Principal Private Secretary to Prince of Wales and member of the Prince’s Council.

<sup>40</sup> Bartlett, op. cit.p 141

<sup>41</sup> Halsbury’s Laws of England – (2010) 5<sup>th</sup> Edition Volume 24 Para 314



## Chapter 7

### The Duchy of Cornwall – A “Private Estate”?

**“The concept the Duchy is a private estate is misconceived.”<sup>1</sup>**

**“The Duchy of Cornwall is simply a private landed royal estate and Crown body.”<sup>2</sup>**

#### A Introduction

The precise status of the Duchy of Cornwall has been a matter of debate for decades. The Duchy is clear it is a “private estate” even a “well managed private estate”<sup>3</sup>. Government is equally certain, for example the Treasury stated; “...the Duchy of Cornwall are (sic) established as private estates under ancient charters and legislation...”<sup>4</sup> while Michael Wills, M.P. Minister of State at the Ministry of Justice in a written Parliamentary Answer on 9<sup>th</sup> February 2009 said “The Duchy of Cornwall is a private estate.”<sup>5</sup> Graham Haslam claimed the Duchy is a “publicly accountable private estate”<sup>6</sup>.

There are those over the years who have disputed that the Duchy is a “private estate”. For example in 1837 Lord Brougham, a former Lord Chancellor, said the Duchy was not:

“..anything like private property they were public funds vested in the Sovereign only as such, enjoyed as Sovereign and in right of the Crown alone, held as public property for the benefit of the State...”<sup>7</sup>

Lord Melbourne’s Government required “the crown to cease regarding the duchies as private property and begin registering them as part of its public provision.”<sup>8</sup>

More recently in 1936 Clement Attlee, M.P., the future Prime Minister, during a speech in the Commons on the Civil List, said:

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<sup>1</sup> House of Commons *Report from Select Committee on the Civil List 1971 – 1972* HC29 para. 38

<sup>2</sup> Letter to Mr Colin Murley from Ministry of Justice 4<sup>th</sup> June 2010

<sup>3</sup> See Duchy of Cornwall Accounts 2010 and also the Duchy of Cornwall web site

<sup>4</sup> Letter from HM Treasury to writer 1<sup>st</sup> September 2008

<sup>5</sup> HC Answers 9<sup>th</sup> February 2009 column 1531W

<sup>6</sup> Haslam, G., “Modernisation” in Crispin Gill (Ed.) *The Duchy of Cornwall* (1987) pp 51-2

<sup>7</sup> HL Debate 20 December 1837 vol. 39 cc 1356-7. 1362

<sup>8</sup> Quoted in William Kuhn’s “Queen Victoria’s Civil List: What did she do with it” (Sept 1993) *The Historical Journal* Vol 36 No 3 at page 652

“The Duchies are historic survivals and that they cannot be considered in any way to be private estates.”<sup>9</sup>”

Mr Edward Leigh, M.P., then Chairman of the Committee of Public Accounts, stated:

“..we believe the two Duchies may be private estates, in a special sense....their accounts are presented to Parliament, certainly in the case of Cornwall the Treasury is closely involved. This makes them quite different from other private estates such as the Grosvenor Estate....”<sup>10</sup>

Characteristics which make the Duchy an unusual private estate have been pointed out in previous pages. The Duchy may be a unique private estate but that does not, of itself, mean it is not entitled to describe itself as such. The purpose of this Chapter is to explore the background to the use of the term, then to consider if it is an accurate description or whether it is used as a convenient means to obscure its true nature and whether as suggested by Counsel in a recent case, the term “private estate”:

“...appears to form part of a concerted and considered strategy to influence (not to say distort) third parties’ (particularly Government and the Courts) understanding of the Duchy’s true legal status.”<sup>11</sup>

## *B Private Estate – Background*

It is arguable that sovereigns at various times regarded the whole of England as their “private estate”. Ann Lyon refers to the sons of the Conqueror as being “mainly concerned with the maximising of royal revenues and in this way did treat England as a “private estate”<sup>12</sup>. Prior to that the King made law with little or no constraints. Inevitably tensions emerged between a developing parliament and the King. A particular source of disagreement was the question of money, specifically the King’s ability to impose additional taxes<sup>13</sup>. The desire was that the King should “live off his own”, that is pay for the costs of his household and of government from the receipt of various royal revenues which included profits from land and escheated estates, court fines. The revenues

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<sup>9</sup> HC Debate 7<sup>th</sup> May 1936 vol. 311 cc 1992-2015

<sup>10</sup> Evidence before the House of Commons Select Committee on Public Accounts: The Accounts of the Duchies of Cornwall and Lancaster 7<sup>th</sup> February 2005

<sup>11</sup> *Michael Bruton v ICO and The Duchy of Cornwall* (2011) EA/2010/0182

<sup>12</sup> Lyon, Ann, “*Constitutional History of the United Kingdom*” (2003) p 25

<sup>13</sup> See for example *Ibid* p 55



included income from the Duchy of Cornwall, when there was no Duke of Cornwall or he was a minor. An additional difficulty was the confusion between the monarch's personal finances and the national finances<sup>14</sup>. For a long time Parliament remained a creature of the Crown. Only the King could summon Parliament and he controlled its composition. Over time the Crown conceded that a Parliament should be called when additional revenues were needed.

By the fifteenth century it:

“....was well established that extraordinary taxation required the assent of a Parliament whose basic composition was now clear.”<sup>15</sup>

It was to be a long time before the limits of the power of Parliament became clarified but it was apparent by the 1560s the raising of revenue by the Crown could only be dealt with by means of a Parliamentary statute.

On the ascent to the throne of James I, in 1603, there was Crown debt of £400,000 which rose to £726,000 by 1617. It was obvious, and had been for some time, the Monarch could not “live off his own” and taxation supposedly only used for extraordinary purposes became a normal source of revenue raising<sup>16</sup>. Tensions arose with James I asserting: “impositions were a matter for the Crown” while Parliament claimed all types of tax were a matter for them. The struggle for power between the Crown and Parliament, one cause of which was the issue of money, resulted eventually in the Civil War. Charles I was executed and there was a Commonwealth headed by Oliver Cromwell. After the restoration of the monarchy in 1660 it was finally accepted the King could not “live off his own” and the traditional source of Crown revenues needed to be supplemented by taxation.

The first Civil List Act was passed in 1697, during the reign of William III, by which Parliament assumed responsibility for certain expenditures while the King retained the obligation to meet other costs. The King surrendered the Hereditary Revenues of the Crown including the revenues arising from the Royal Duchies but was allowed to retain a proportion of the Hereditary Revenues which provided £700,000 per annum to pay for

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<sup>14</sup> *Ibid* p 85

<sup>15</sup> *Ibid* p 152

<sup>16</sup> *Ibid* p 199

Civil List expenditures. A similar arrangement was agreed when Queen Anne ascended the throne. A Civil List Act has been passed at the beginning of each reign.

A Civil List broadly similar in shape to that which with which applies today was agreed with the accession to the throne of George III in 1760. The Hereditary Revenues were surrendered, except the Royal Duchies in exchange for a fixed Civil List. It should be noted that there is no question the Royal Duchies were not regarded as part of the Hereditary Revenues; otherwise the various Civil List Acts would not have excluded them specifically from the revenues to be surrendered.

An issue which arose during the reign of the Hanoverians was the problem of the “independence of the Crown and parliamentary control of finance”<sup>17</sup>. Robert Walpole expressed the view in 1737 that:

“His Majesty has as absolute a right to the whole of the civil list revenue, during his life as any gentleman in England can have of his own estate.”<sup>18</sup>

Lord Newcastle in 1760 said:

“It is your Majesty’s own money; you may do with it as you please.”<sup>19</sup>

Debates continued into the degree to which Parliament should have oversight of Civil List expenditure. Lord North said: “Parliament should not look into all private expences of the sovereign, into every nice point of domestic economy.”<sup>20</sup> Eventually the efforts of Edmund Burke, M.P. resulted in the Civil List Act of 1782 which brought the Civil List under Parliamentary control and: “..destroyed the conception of the Civil List as an independent financial provision for the Crown.”<sup>21</sup>

When William IV came to the throne Lord Grey established a Select Committee on the Civil List which precedent has been followed ever since. This had the power to enquire into the exact details of royal expenditure to determine just how much the new monarch would need.

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<sup>17</sup> Reitan, E. A., “The Civil List in Eighteenth Century British Politics” (1966) *The Historical Journal* ix 3 p 320

<sup>18</sup> Quoted in Reitan see also Parliamentary History, ix col 1405

<sup>19</sup> Quoted in Reitan see also Hardwick Papers, B.M. Add. MSS 35419, fo. 255

<sup>20</sup> Quoted in Reitan at page 327 see also Cavendish Debates, I, 272

<sup>21</sup> Reitan, op. cit. p 329

One should note that the Royal Duchies had escaped parliamentary enquiry on the grounds they were the sovereign's private property<sup>22</sup>. In 1837 Queen Victoria agreed, as a concession to Parliament not insisting on the surrender of the income from the Royal Duchies, that accounts would be presented to Parliament once a year following the passing of the Duchies of Lancaster and Cornwall (Accounts) Act 1838. It is at this point the Duchy of Cornwall is claimed to have become a "publicly accountable private estate"<sup>23</sup>.

### *C The Duchy of Cornwall and the Civil List*

On the accession of George I to the throne in 1714 it was agreed that he would receive a Civil List of £700,000. However, the then Prince of Wales, the future George II, was to receive £100,000 from that Civil List plus the income from the Duchy of Cornwall. This pattern continued. The son of George II, Frederick who died in 1751 before ascending to the throne, received £50,000 from the Civil List plus the income from the Duchy which was to be increased to £100,000 when he married. The most extravagant of all the Georgians was the Prince Regent, the future George IV was voted a Civil List annuity in excess of £120,000 per annum. He, of course, received the income from the Duchy in addition to the Civil List annuity. When George IV came to the throne he received the Civil List and the income from the Duchy of Cornwall since his heir was his brother, William IV, whose successor was Victoria so he, like his brother, retained the income from the Duchy.

Like her two Uncles who preceded her Victoria kept the income from the Duchy of Cornwall. The Select Committee which considered the Civil List and the Act which followed makes no mention of the Royal Duchies at all<sup>24</sup>. Victoria's Civil List was regarded as exceptionally generous – "the appropriation to the Crown of the largely increased revenues of the Duchies made it more than liberal."<sup>25</sup>

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<sup>22</sup> Kuhn, op. cit. p 652

<sup>23</sup> Haslam, op. cit. pp 51-52

<sup>24</sup> House of Commons – *Report from the Select Committee appointed to inquire into the accounts of income and expenditure of The Civil List to 31<sup>st</sup> December 1836*, 1837 HC22 and Civil List Act 1838.

<sup>25</sup> Walpole, Sir Spencer, *History of England* vol. iii p 402 quoted in TNA T 38/837 – Civil List Notes (1897)

Her son Prince Albert Edward (later Edward VII) was born in 1841 when he became entitled to the income from the Duchy of Cornwall. He received a Civil List Annuity of £40,000 when he attained 21 in 1862 in addition to the net Duchy income of £46,000<sup>26</sup>. His total income in the last year of Victoria's reign was £106,000 (over £9 million in 2012).

The heir to Edward VII was Prince George (later George V) who was born in 1865 and was 36 when his father became King. He became entitled to the income from the Duchy of Cornwall immediately on his father becoming King. He was in addition provided with a Civil List annuity of £20,000 and an annuity to his wife of £10,000<sup>27</sup>.

George V became King in 1910 and this marked a considerable change. His heir was Prince Edward (later Edward VIII) who was born in 1894 and became Duke of Cornwall directly his father ascended the throne. On this occasion no Civil List provision was made for the heir to the throne. It was expected that his personal expenditure and the costs of his public duties be met from the income from the Duchy of Cornwall<sup>28</sup>.

The future George VI, when his brother became King, was entitled to a Civil List Annuity under the Civil List Act 1910. He was voted a further annuity of £25,000 which was effectively paid by the Duchy of Cornwall. The King's Civil List was to be reduced by the income from the Duchy, to which the King became entitled less an amount paid to his brother<sup>29</sup>. A similar arrangement was made when George VI ascended the throne. The Duchy of Cornwall income was used to reduce the Civil List less an amount equal to payments to his heir Elizabeth.

A memorandum from the Chancellor of the Exchequer, Mr. R. A. Butler dated 4<sup>th</sup> April 1952 sets out the position of the Treasury. After allowing for a sum to be set aside for the "maintenance and education of Prince Charles":

“...the balance of the revenues, about £60,000 per annum, should be made available to the Exchequer in relief of Civil List liability.”<sup>30</sup>

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<sup>26</sup> HC – *Report from the Select Committee on Grants to Members of the Royal Family* 1889 HC271 p4

<sup>27</sup> HC – *Report from the Select Committee on the Civil List* 1901 HC110 p3 /Civil List Act 1901

<sup>28</sup> HC – *Report from the Select Committee on the Civil List* 1910 HC 211 para. 14/Civil List Act 1910

<sup>29</sup> HC – *Report from the Select Committee on the Civil List* 1935-36 HC 74 para. 10.

<sup>30</sup> TNA CAB 129/51 – The Civil List (1952)

The Civil List Act 1952 section 2 provided the Civil List was reduced by the income from the Duchy as follows. While Prince Charles was a minor eight ninths of the Duchy of Cornwall income was used to offset the Civil List with the balance being accumulated for the Duke when he comes of age.

The Sovereign Grant Act 2011 makes explicit a trend which has developed over many years. While once the Heir to the throne was, often, entitled to the income from the Duchy and in addition received a Civil List annuity, the Duchy of Cornwall is now expected to finance both the cost of the public functions and private expenditures of the next in line to the throne whether they are Duke of Cornwall or not.

Despite the historical development outlined above it was claimed by Sir Walter Ross and Sir Michael Peat in evidence that the income from the Duchy was for Prince Charles to spend as he chose. They asserted that there was no requirement for him to use any of it to meet his public functions. The fact that he chose to do so was entirely a matter for him<sup>31</sup>.

#### *D The Duchy of Cornwall – A Private Estate – Initial considerations*

Is it now possible to explore what is meant by the Duchy of Cornwall and Government when they say it is a “private estate”? It was created by statute, its management is determined by statute, its accounts are subject to parliamentary scrutiny at least once a year and its income is used to pay for public purposes. It is subsidised by the State by virtue of its privileged tax position. (The issue of the tax treatment of the Duke and Duchy will be considered in detail in a later Chapter.) The Treasury exercises control and oversight, as “quasi trustee”, on behalf of Government and, therefore of the public. Clearly the description “private estate” is not used in a sense familiar to most of us. The evidence suggests the term is an echo from the eighteenth century and before when the view was there was no right to enquire into how the Crown dealt with its income. The Royal Duchies are the last bastions for which that claim is maintained. They represent some residual degree of independence which the Crown is anxious to maintain. That does not mean that there is no acknowledgement that the public is interested and concessions have been made from time to time. But there is no *right* to enquire. The records of the

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<sup>31</sup> *Kirkhope v Information Commissioner and The National Archive* (2012) (EA/2011/0185)

Duchy of Cornwall are not available to the public. They are not kept at the National Archive. It was explained that:

“...there is no legal obligation on the Duchy to provide members of the public with general access to the archive. Any access which might be granted must therefore be recognised as a privilege rather than a right.”<sup>32</sup>

It is difficult to understand or explain the difference in dealing with the Duchy of Lancaster and the Duchy of Cornwall. They both describe themselves as “private estates”. The records of the Duchy of Lancaster are kept at the National Archives<sup>33</sup> while the archives of the Duchy of Cornwall are not generally available to the public.

The Duchy claims the Freedom of Information Act 2000 does not apply since it is a “private estate”. While the Information Commissioner accepts the Duchy of Cornwall is a “body” for the purposes of Freedom of Information Act 2000 section 84 he concurs with the Duchy claim, in general, the Act does not apply.

In 1897 a Confidential Document entitled “Notes on the Civil List”<sup>34</sup> was prepared for the Government. That paper amongst other things summarised the arguments with regard to the Duchies. In favour of transferring the estates to Parliament:

- 1 On constitutional grounds it is desirable to render the Crown dependent on Parliament;
- 2 A fixed provision for the Monarch and Prince of Wales would be better than uncertain revenue from property;
- 3 The uncertain revenue gives rise to exaggerated notions as to the wealth of the Crown; and
- 4 The existence of three separate administrative authorities for the management of Crown lands is an anomaly.

The reasons for retaining the system were given as:

- 1 That the Duchies are by law the private and personal property of the individual who happens to wear the Crown and are therefore no more to

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<sup>32</sup> Letter to writer from the Attorney General to HRH Prince of Wales 16<sup>th</sup> April 2010

<sup>33</sup> [www.duchyoflancaster.com/about-the-duchy/records-charters/](http://www.duchyoflancaster.com/about-the-duchy/records-charters/)

<sup>34</sup> TNA T 38/837 – Civil List Notes (1897)

be interfered with by Parliament than the private property of any other individual;

- 2 Apart from questions of right and title it is not expedient to make the Crown entirely dependent on Parliament; and
- 3 The payment to the Crown of the money equivalent of the Duchy Revenues might begrudged by the public.

The issues raised in the paper remain unresolved.

Possibly the most honest explanation of the situation with regard to both Royal Duchies was given in a paper written by a Treasury Official<sup>35</sup> for use by Ministers in connection with the Select Committee on the Civil List for Edward VIII in 1936. The document is set in Appendix I. In particular the claim the Duchies were not private estates and should be surrendered. This said:

“The question of the Duchy revenues *is one of policy*. The reasons for which HM Government and previous Government has resisted a change are (a) that they do not think it expedient for the Crown to be entirely dependent for its income on Parliament and (b) that if the Exchequer took over Duchy Revenues and the loss was fully made good by State grants the charge to the Exchequer for the Royal Family would be substantially increased *and an easier mark for criticism than it is at present*. On the other hand some of the Opposition would take the contrary view on (a) and would regard (b) as an advantage.” (emphasis added)

The paper went on to say:

“...the Duchy (of Lancaster) is a system of administration with important duties and functions outside its revenue earning capacity. (How far this is true of the Duchy of Cornwall is not very clear.)

These arguments do not go well in harness since the second tends to show the Duchy of Lancaster is unlike ordinary property..”

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<sup>35</sup> TNA T 160/632 – Royal Family Civil List in relation to the hereditary and temporary revenues of the Crown (1936)

The official who wrote the paper was clearly not familiar with the Duchy of Cornwall which also has “important duties and functions outside its revenue earning capacity” as will be demonstrated in what follows.

Finally it concluded:

“I should be inclined to suggest that these arguments are best dealt with orally.”

House of Commons Committee of Public Accounts

In 2005 the House of Commons Committee of Public Accounts conducted an enquiry into the “The accounts of the Duchies of Cornwall and Lancaster”.<sup>36</sup> The first such enquiry for over 600 years. The reason for the enquiry would appear to have been concern over unusual financial transactions. Timber initially shown in the Duchy Accounts as being owned by the Duchy were then purchased from the Prince of Wales by the Duchy after it was concluded by the Duchy and the Prince, presumably, that the latter owned them after all. There was also a concern expressed by Alan Williams M.P. that: “...Prince Charles is not abusing taxpayers’ money in any way.”<sup>37</sup>

The hearings took place on 7<sup>th</sup> February 2005 and subsequently the Committee made a number of “Conclusions and recommendations” which as far as can be ascertained have been ignored.<sup>38</sup> In summary the suggestions were:

- 1 The direct involvement of the Prince of Wales in the Management of the Duchy and the appointment of Members to the Prince’s Council creates a potential conflict of interest. Governance arrangements should be modified so that as with the Duchy of Lancaster, the beneficiary has not direct role in the management of the Duchy. The principles of public appointment should be adopted, as they have been by the Duchy of Lancaster to ensure they are made on merit and command public confidence.
- 2 The basis upon which the Treasury approves capital transactions should be clearer. Public sector good practice involving greater disclosure of information to Parliament should be followed. The Duchies are not bound to meet the disclosure requirements for public sector organisations or publicly limited companies. For

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<sup>36</sup> HC Committee of Public Accounts “The accounts of the Duchies of Cornwall and Lancaster” (2004-2005) HC 313

<sup>37</sup> Barnett, A., “The prince of property and his £460m business empire.” *The Observer* 30 January 2005

<sup>38</sup> HC Committee of Public Accounts op. cit pages 5 - 6



example, they had not complied with the appropriate Financial Reporting Standard for dealing with pension deficits which had the effect of increasing the surplus available to the Queen and the Prince. The Comptroller and Auditor General should be given full access to the accounts of the Duchies. The Duchy considered that as private estates they should be able to choose their own auditors and saw no role for the Comptroller.

- 3 Duchy accounts should be clearer particularly in regard to recharging costs from revenue to capital, borrowing from capital account for revenue purposes and which assets are owned by the Duchy and those by the Prince of Wales. It was revealed during the hearings some £600,000 was, during 2003-4 borrowed against the capital account for revenue purposes. The arrangements regarding Highgrove were also highlighted. It being pointed out the rent paid by the Prince goes back to the revenue account and therefore is returned to the Prince. A witness from the National Audit Office said the accounts were “difficult to work through”.<sup>39</sup>

- 4 The Treasury should be asked to justify the tax position of the Duchies.

Most telling the Committee recommended that the Treasury should review whether arrangement dating back to the fourteenth century and to that extent “an accident of history” remain appropriate in the present-day circumstances. A witness from the Treasury did not consider such a review was part of their “function”.<sup>40</sup>

The members of the Committee subjected both Duchies to detailed scrutiny. Since 2005 they have not, until now, returned to the subject. The present Chairperson of the Committee, Mrs Margaret Hodge, M.P. has asked the Treasury to justify the tax benefits enjoyed by the Duchy of Cornwall. The main recommendations have not been implemented. For example, the Treasury have not conducted a review of the appropriateness of the arrangements or justified the tax position of the Duchy. The Prince continues to pay rent on Highgrove which is then returned to him. The rules which apply to public sector bodies and publicly limited companies do not apply unless the Duchy chooses to implement them.

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<sup>39</sup> House of Commons – Committee of Public Accounts op. cit p Ev 5

<sup>40</sup> *Ibid* p Ev 3

## *E The Duchy of Cornwall and its Public Administration Functions*<sup>41</sup>

There have been a number of requests for information from the Duchy of Cornwall by various parties either under the Freedom of Information Act 2000 (“FOIA”) or the Environmental Information Regulations 2004 (“EIRs”). These requests have been resisted by the Duchy which refusal has been upheld on appeal to the Information Commissioners Office (“ICO”). The decision of the ICO has now been successfully challenged. The First Tier Tribunal (Information Rights) closely examined whether the Duchy is a public authority for the purpose of section 2(2)(c) and or 2(2)(d) of the EIRs<sup>42</sup>.

The regulations provide in summary:

A public authority means:

Government departments; and

Any other body or person that carries out functions of public administration.

The principles were laid down in the case of *Smartsources Drainage & Water Reports Limited v Information Commissioner* (2011)<sup>43</sup> which established that: “A body will be a public authority under the regulations whenever it carries out a public function.”

An argument put forward by the Duchy and supported by the ICO is that the Duchy is not a “legal person” for the purposes of the EIRs. This is an issue which has already been explored.

As explained above, the most obvious public administrative function performed by the Duchy of Cornwall is providing financial resources for one of the core functions of the United Kingdom i.e. supporting the Sovereign and the Heir to the throne in their official duties.

Under the Duchy of Cornwall Act 1844 section 36, the Duchy has the power to fix fees for the inspection of enrolments which the Duchy acknowledges is an “administrative

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<sup>41</sup> I am indebted to Joseph Barrett Barrister of 11KBW Chambers, 11 Kings Bench Walk, Temple, London for his generous sharing with me the fruits of his research.

<sup>42</sup> *Michael Bruton v Information Commissioner, The Duchy of Cornwall and The Attorney General to HRH the Prince of Wales* (2011) (EA/2010/0182)

<sup>43</sup> *Smartsources Drainage & Water Reports Limited v Information Commissioner* (2011) 1 Info LR 1498

function”. Sections 30-36 of that Act make it clear the Keeper of the Records is under a statutory duty to enrol deeds in the Office of the Duchy of Cornwall at which point they need not be registered in any other public registry but will be “good and available” to the public. The Office of the Duchy of Cornwall is effectively the public registry in respect of Duchy lands. This is a public administrative function established by statute.

If a person dies intestate (i.e. with no heirs or anyone entitled to their estate) domiciled in Cornwall or a dissolved company with its last registered address being in that County, then the Duchy of Cornwall is entitled to *bona vacantia*<sup>44</sup>. The Duchy of Cornwall claimed, which claim was accepted by the ICO, that this was a “property right”. The contrary argument is that in exercising this function the Duchy is performing a classic public law duty.

In *Hensloe’s Case* (1599) Lord Coke said:

“That of ancient time, as appears by record when a man died intestate, and had made no disposition of his goods, nor committed his trust to any, in such case the King, who is *parens patriae*<sup>45</sup>, and has the supreme care to provide for all his subjects, that everyone should enjoy that which he ought to have, used by his ministers to seize the goods of the intestate, to the intent they should be preserved.....”<sup>46</sup>

Blackstone stated:

“..in settling the modern constitutions of most of the governments in Europe, it was thought proper (to prevent that strife and contention, which mere tide of occupancy is apt to create and continue, and to provide for the support of public authority in a manner least burdensome to individuals) that these rights [of *bona vacantia*] should be annexed to the supreme power by positive laws of the state...”<sup>47</sup>

In the leading paper on *bona vacantia* in England, Ing identifies “the fundamental basis of *bona vacantia*” as “the Crown’s duty to maintain good order in the realm, rather than

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<sup>44</sup> [www.bonavacantia.gov.uk/output/links.aspx](http://www.bonavacantia.gov.uk/output/links.aspx)

<sup>45</sup> Parent of the Nation

<sup>46</sup> *Hensloe’s Case* (1599) (9 Coke Reports 36b) p 38b

<sup>47</sup> 1 Bl. Comm. 299 (14<sup>th</sup> Edition 1803)

support the royal dignity.”<sup>48</sup> That is to say it is part of one of the core duties of the state rather than a mere property right.

The Crown’s *bona vacantia* function has now been placed on a statutory basis in the form of the Administration of Estates Act 1925 (“AofE”), the Companies Act 1985 (“CA 1985”) and the Companies Act 2006 (“CA 2006”). These for England, with the exception of Cornwall, give power to the Treasury Solicitor to act on behalf of the Crown and impose various duties upon them. The Duchy of Cornwall’s *bona vacantia* function is also covered under the AofE and CA 1985 and CA 2006.

The CA 2006 provides for assets of dissolved companies to vest in the Duchy where *bona vacantia* arises and makes detailed provision for the manner in which such assets are to be administered including rules about disclaimer and the restoration of assets or payment of compensation where a dissolved company is restored to the register. The Duchy’s power to give or withhold consent to the restoration of a company to the register is clearly a public administrative function.

#### Statutory Harbour Authority in respect of the Isles of Scilly: St Mary’s Harbour

Under the Pier and Harbour Order Confirmation (No 4) Act 1890 (“the 1890 Act”), the St Mary’s (Isles of Scilly) Harbour Revision Order 2007 (“the 2007 Order”) which includes most of the provisions of the Harbours Docks and Piers Causes Act 1847 (“the 1847 Act”) the Duchy is the Statutory Harbour Authority (“Statutory HA”) for the Isles of Scilly. In this capacity the Duchy exercises a variety of public administrative functions as follows.

Under the Harbours Act 1964, as Statutory HA it has the “powers or duties of improving, maintaining or managing a harbour”. This power and duty is imposed on the Duchy by virtue of the 1890 Act as expanded by the 2007 Order. As Statutory HA the Duchy is also the relevant body under the Merchant Shipping Act 1995, the Prevention of Pollution (Reception of Facilities) Order 1984, the Dangerous Vessels Act 1985, the Dangerous Substances in Harbour Areas Regulations and provisions under the Merchant Shipping and Maritime Security Act 1997 and Pilotage Act 1987

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<sup>48</sup> Ing, Noel D., “*Bona Vacantia*”, (1971) p12

Douglas and Green on the Laws of Harbours, Coast and Pilotage<sup>49</sup> state the powers granted to a harbour authority are in virtually all cases “for the purpose of providing a public service”. As illustrated in *Re Salisbury Railway*<sup>50</sup> the court interpreted section 33 of the 1847 Act as imposing the implied obligation to continue to maintain the harbour for the benefit of the public.

The Duchy has the right to deepen, dredge, scour and improve the bed and foreshore of the harbour to render it safe for traffic. Under the Merchant Shipping Act 1995 the Duchy is the local lighthouse authority under which it has power to mark and light the harbour area. It has the power to remove wrecks from the harbour area. The Harbour Master, who is appointed by the Duchy, has the capability to issue binding directions regulating the activities of ships using the harbour. In *Guelder Rose*<sup>51</sup> Lord Widgery C.J. said the function of the Harbour Master: “is to control and regulate (shipping) rather like a traffic policeman regulating traffic.” Under the Dangerous Vessels Act 1985 the Duchy may exclude ships from the harbour if they constitute a danger to the public. Failure to comply with such a direction is a criminal offence. As Statutory HA under section 83 of the 1847 Act there is authority for the Duchy to enact bye-laws for the management of the harbour area. Under section 57 of the Criminal Justice Act 1988 breach of these bye-laws is a criminal offence punishable by fine.

The Duchy is, also, subject to a wide range of obligations concerning the environment, conservation, freedom of public access to places of natural beauty etc. It also has duties with regard to the prevention of pollution under section 144 of the Merchant Shipping Act 1995. As Statutory HA in its capacity as a marine pilotage authority, under section 1 of the Pilotage Act 1987, it has a statutory duty and power to protect public safety and the environment. The Duchy regulates, administers and licenses pilots within its harbour areas and approaches. It decides the age, fitness, experience and skills necessary to qualify as a pilot and has the obligation to suspend an authorisation on grounds of incompetence, misconduct etc. The Pilotage Act 1987 imposes a wide range of additional functions and duties on the Duchy in connection with its position as Statutory HA.

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<sup>49</sup> Green, G K., et al - *Douglas & Green on the Laws of Harbours, Coasts and Pilotage 5<sup>th</sup> Edition*, (1997)

<sup>50</sup> *Re Salisbury Railway and Market House Co* (1967) (3 WLR 651)

<sup>51</sup> *The Guelder Rose* (1927) (136 LT 226)

All the duties set out above arise from the fact that they have been imposed by statute and are without doubt public administrative functions and the Duchy is, therefore, a public authority at least as far as the EIRs are concerned.

#### Other Public Authority considerations

In addition to the matters set out above the Duchy, of course, has:

- The right to appoint the High Sheriff of Cornwall;
- The right to wreck, treasure trove and royal fish; and
- The right to be consulted on legislation and give consent to legislation with affects its “hereditary revenues, personal property or other interest.”

#### *F Crown Private Estate Acts*<sup>52</sup>

On 3<sup>rd</sup> June 2009 Andrew George MP for St Ives asked a question of the Secretary of State for Justice, in part, as follows:

“What definition his Department uses of (a) a private estate in relation to the status of Duchy of Cornwall....”

The reply from Bridget Prentice M.P. Parliamentary Under-Secretary of the Ministry was:

“In general terms the Duchy of Cornwall is a private estate in that they belong to the heir apparent in their private capacities. The term “private estates” is however defined in several statutes including the Crown Private Estates Acts 1800, 1862 and 1873 and the Crown Lands Act 1823. The meaning of the term in this context is governed by the relevant statute.”<sup>53</sup>

The Crown Estates Act 1800 was intended to achieve what the Courts found difficult to do: to distinguish the public from private in respect of property of the Crown. Until the passing of the Act, the King had only a public legal identity and was unable, it was argued, to own property as a private person. Any land purchased would become part of Crown Lands and could not, in accordance with the Crown Lands Act 1702, be sold without the approval of Parliament. Neither could the King make a binding will, thus; on

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<sup>52</sup> Much of the information contained in this section has been obtained from Philip Hall’s *Royal Fortune* (1992)

<sup>53</sup> HC Written Answers 3 June 2009 Column 526W

his death any “private property” would become merged with Crown Lands and pass to his successor whether he liked it or not. The Act of 1800 allowed the King to become a private person as well as head of Government.

The Crown Land Act 1823 extended the concept of the Crown’s private estate to property vested in the Monarch at the time of his/her accession to the throne. The Act of 1862 was passed because it was concluded the Act of 1800 did not apply to Scotland. The change was necessary because Victoria had inherited Balmoral from Albert in whose name it had had to be purchased<sup>54</sup>. Although the 1800 Act has not been repealed it has largely been superseded by the 1862 Act. The 1873 Act was passed to remove further doubts which arose under the 1800 Act. It refers to:

“..And whereas it may be doubtful whether...any such private estates of Her Majesty ..continue to be held as his or her private estates; and it is expedient that such doubts be removed..”

The House of Commons Select Committee on the Civil List 1971-72 concluded the only Act relevant to the Crown private estates is the Act of 1862<sup>55</sup>.

The property of the monarch can be now separated into that which is “in right of the Crown”, in other words property owned by the Queen in her political capacity, and that which is in the name of the monarch as, if you will, a “private individual”. The property owned by the monarch in his or her “political capacity” is operated by the Crown Estates Commission. For example, the ownership of the Crown Jewels may be in the monarch’s name but he or she owns them as monarch and they could not in practice sell them<sup>56</sup>. In the context of the Crown Private Estates Acts property means real property i.e. land: thus Balmoral purchased in 1850 and Sandringham purchased in 1861 are owned by the Queen in her private capacity.

Section 8 of the 1862 Act provides that:

“The private estates of Her Majesty, her heirs and successors, shall be subject to all such taxes, rates, duties and assessments, and other impositions, parliamentary,

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<sup>54</sup> See the footnote in *The Nature of the Crown* (Ed Maurice Sunkin and Sebastian Payne) (1999) p 59

<sup>55</sup> HC *Report from the Select Committee on the Civil List 1971 – 72* HC29

<sup>56</sup> For a more detailed consideration of the various forms in which the monarchy owns property see Philip Hall *Royal Fortune* (1992) pages 160 et seq.

parochial, as the same would have been subject to if the same had been the property of any subject of this realm....”

The Inland Revenue has received advice that this means that since the legislation refers to “private estate being subject to tax” this means taxes charged on land<sup>57</sup>. So the Queen may own a farm on which she would be obliged to pay rates and council tax since those are taxes on property. While the profits of the farm would, it is argued, not be taxable since farming is defined as a trade. Under the Memorandum of Understanding of 1993<sup>58</sup> the Queen clearly does pay tax but on a voluntary basis. She is only legally obliged to pay taxes charged on land.

In summary the Crown Private Estates Acts allowed the monarch to own property as a private person and those “private estates” were, at least in theory, subject to the same tax regime as if they were owned by a private individual. The monarch could also make a valid will by which he or she may dispose of that private property.

Does the answer given by Ms Prentice, as she implies, help in more fully understanding the status of the Duchy?

The Solicitor to the Board of the Inland Revenue wrote in 1913:

“It may be mentioned that the Crown Private Estates Acts do not appear to apply to the lands of the Duchy of Cornwall those lands being expressly exempted, or excluded under the general provisions which prevent those Acts from applying to lands which are possessed by the Sovereign through inheritance from His predecessors.”<sup>59</sup>

The answer provided by Ms Prentice is misleading. The Duchy of Cornwall was created in 1337, four hundred and sixty three years before the passing of the 1800 Act. Are we to assume after all that length of time its status changed with the passing of the Act? Clearly it did not. Next the property of the Duchy of Cornwall was not acquired from the Monarch’s private income. It was Crown land transferred to the Duchy. The Duchy of Cornwall and indeed the Duchy of Lancaster are part of the Hereditary Revenues of the

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<sup>57</sup> *HC Report from the Select Committee on the Civil List 1971 - 72* HC29 – Evidence given to Committee by Mr Strudwick and Sir Douglas Allen on behalf of the Inland Revenue. p669

<sup>58</sup> *HC Report of the Royal Trustees 1993* HC464

<sup>59</sup> TNA LO 3/467 - Duchy of Cornwall Land Tax and Valuation (1913)



Crown which, unlike the other similar revenues, have not been surrendered. The Duchy of Cornwall cannot be passed under the will of the monarch or that of the Duke.

The Revenues of the Duchy are used for public purposes assisting in the financing of the Crown from time to time or to meet the public duties of the Heir to the throne. Accordingly they are taken into account when assessing how much taxpayers should provide, by way of the Civil List. That is not the case of the private estates as defined under the Crown Private Estate Acts.

### *G Conclusion*

The Hereditary Revenues of the Crown provided the resources which paid for the Government. Over time as Parliament removed from the Crown the necessity to meet various obligations it also required the Crown to surrender those revenues. In exchange for the Hereditary Revenues the Crown was voted a Civil List. Initially it was regarded as inappropriate that Parliament should enquire how the funds voted by it were spent. The Civil List was considered private and for Parliament to ask questions was not “dignified”. That changed after Burke’s Act of 1782. The Crown could no longer exercise control over the Hereditary Revenues and had to concede to Parliament the right to enquire how funds were spent.

The Royal Duchies stood firm and resisted, to a large degree, the encroachment of Parliament. They were indisputably part of the Hereditary Revenues of the Crown. However, with the coming of the Hanoverians they were not relinquished with the rest of the Hereditary Revenues. They represented an independent source of income subject to the control of the monarch or the monarch’s heir. Although concessions had to be made in that accounts had to be presented to Parliament once a year essentially they remained private in a way all the Hereditary Revenues once did. For nearly 200 years the Royal Duchies have continued to be called “private estates” despite the fact the meaning of that term represents something entirely different now from that understood at the time of Robert Walpole or Lord Newcastle. The Duchies are the last vestige of a convention which suggests the income of the Crown, whatever the source, is a matter solely for the Crown and is not subject to enquiry, either as to its origins or its use, by Parliament or the people. The fact that those incomes benefit from various privileges makes no difference:

we the people or the representatives of the people may not enquire because they are “private estates”.

If a comparison is made with estates like that of the Duchy of Westminster or the Duchy of Devonshire then very quickly the differences become obvious. The estates of the Dukes of Westminster and Devonshire do not claim Crown Immunity; they have no right to consent to legislation which affects their personal property or other interests. They cannot make law, albeit bye-laws whose breach is a criminal offence. They are not asked to finance the official functions of the Head of State or pay the costs of the successor to the Head of State. They do not collect *bona vacantia* in Devon or Westminster. To describe the Duchy of Cornwall as a private estate is to use the term in a way which very few people would understand. It is a term used by Government and others without any attempt at explanation. There is no statutory definition of the term as it is used in connection with the Royal Duchies. The term is not used in the ordinary sense of that expression. It is not used as a legal term of art so one is driven back to the question of what exactly is being said when the Duchy says it is private estate.

The evidence suggests that it is the very ambiguity of the term which is its major benefit as far as Government and the Duchy are concerned. It can mean what they want it to mean. It is not too much of an exaggeration to say the description is deliberately misleading because it does suggest comparison with undeniably private estates when clearly it is quite different. The term is typically used as a means of declining access or as an explanation for the refusal to provide information. However the Duchy becomes part of the Crown when it wishes to claim a privileged status. Its dexterity is enviable.

Whether or not this is the intention the use of the term causes confusion and provides a distorted impression of the full extent of the duties, powers and obligations of the Duchy and of the privileged position which it enjoys. Despite the claim it is a “publicly accountable private estate” the evidence suggests the Duchy is not publicly accountable.

Oliver Franks, Lord Warden of the Stannaries from 1983 - 1985 summarised the situation in 1987 as follows:

“How can anything, the Duchy of Cornwall or any other institution, be both private and public? It must be one or the other. A paradox can be a way of stating something sensible and thoroughly practical in its working.

Public accountability is at once a discipline and protection. The Duchy can move forward and face the future in the knowledge that it regularly keeps Parliament and the public informed of its activities.”<sup>60</sup>

The problem with the complacent view expressed above is that the public does not know, for example, of the involvement of the Duchy and Duke in our legislative process or the fact the Freedom of Information Act does not apply. It is not publicly accountable in the way we have come to expect.

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<sup>60</sup> Franks, O., “The Way Ahead” in Gill, C., (Ed.) *The Duchy of Cornwall* (1987) p 256

## Chapter 8

### An Extraordinary “Private Estate”

*“This is one of the traditional things we have inherited.”<sup>1</sup>*

#### A Introduction

Today the Duchy states that it is a “well-managed private estate”<sup>2</sup>, without any qualification to that statement. The expression is not surrounded by inverted commas to indicate some special or particular meaning. This implies we are to attach to the phrase “well-managed private estate” its ordinary meaning. That cannot be correct. Some of the ancient rights enjoyed by the Duchy have already been examined particularly in Chapters 2 and 4. A significant number of privileges continue to be enjoyed by the Duchy of Cornwall which makes it unlike any other private estate, well-managed or otherwise. It is these advantages which will now be examined.

A separate Chapter is devoted to the Duchy’s right to be consulted and give consent to legislation which affects its “Hereditary Revenues, personal property and other interests” and its enjoyment of Crown Immunity.

#### B *“The Duchy is not Cornwall and Cornwall is not the Duchy”<sup>3</sup>*

A famous Cornishman, A. L. Rowse, sought to correct what he regarded as a common misconception when he wrote:

“It is first necessary to clear out of the way the popular confusion between the Duchy and the County of Cornwall. They are, of course, two entirely separate entities, utterly different in character..”<sup>4</sup>

It is explained by the Duchy with reference to Cornwall “..the Duchy has a special relationship with the County”<sup>5</sup>. The Law Commissioners, in relation to its report on Land Registration, which led to the Land Registration Act 2002, said:

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<sup>1</sup> Statement made by Sir Walter Ross, Secretary and Keeper of the Records to Parliamentary Accounts Committee 7<sup>th</sup> February 2005 in relation to *Bona Vacantia*

<sup>2</sup> [www.duchyofcornwall.org/faq/htm](http://www.duchyofcornwall.org/faq/htm)

<sup>3</sup> Gill, C., “Introduction” in Gill, C., (Ed.) *The Duchy of Cornwall* (1987) p 14

<sup>4</sup> Rowse, A. L., *West Country Stories* (1945) p 94

<sup>5</sup> [www.duchyofconrwall.org/abouttheduchy\\_history\\_acquisition.htm](http://www.duchyofconrwall.org/abouttheduchy_history_acquisition.htm)

“Due to the complex and arcane nature of the law that governs the land holding of the Crown and the Royal Duchies of Cornwall and Lancaster; the preparation of the relevant provisions of the Bill proved to be particularly difficult.”<sup>6</sup>

The purpose in this section is to disperse some of the “popular confusion”, to explain one aspect the special relationship the Duchy has with Cornwall and to unravel some of the complex and arcane land law relating the Duchy of Cornwall. It will be demonstrated in one respect at least the “Duchy is Cornwall”.

To aid understanding it is essential that some of the legal theory is set out and in that regard we might usefully start with Joseph Chitty who explained:

“That the King is the universal lord and original proprietor of all lands in his kingdom; and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services.”<sup>7</sup>

The reference by Chitty to feudal service is valuable because to understand the system of land law within England and Wales we must reach back to a time, long past, when people acquired rights in land usually in exchange for services. It might be the provision of horses or salmon or the financing of men at arms in times of strife. Thus land in England and Wales is held by the landowner for a “legal estate” in fee simple<sup>8</sup>. The first and important point is that the landowner *does not own the land he or she owns an interest in the land* or as lawyers explain it a “legal estate”. The only exception is land held by the Crown in demesne, for “no subject can hold lands allodially”<sup>9</sup>. (Allodial land describes land which is owned absolutely rather than land held of a superior lord or sovereign.) Demesne lands, in this context, are those held by the Crown as Sovereign or Lord Paramount. The ordinary meaning of “demesne” is land belonging to a feudal lord which he retains in his own possession rather than “parcelling out to his feudal tenants”<sup>10</sup>. In simple terms while the rest of us have an “estate in land” only the Crown can actually

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<sup>6</sup> Law Commission and HM Land Registry Land Registration for 21<sup>st</sup> Century: A Conveyancing Revolution, Law Com 271 2001 p 243

<sup>7</sup> Chitty, J., *A Treatise on The Law of the Prerogatives of the Crown* (1820) p 211

<sup>8</sup> In what follows extensive quotes come from the Law Commission and HM Land Registry Land Registration for the 21<sup>st</sup> Century: A Conveyancing Revolution Law Com 271 2001 pages 245 et seq

<sup>9</sup> Burke, J., *Jowitt's Dictionary of English Law* (2<sup>nd</sup> ed 1977) p 89

<sup>10</sup> E Mail correspondence with Land Registry 12 March 2009

own land. The Crown has the power to create interests in land out of its demesne land. Indeed it is the only way it can create a freehold estate. This is called “infuedation”. No other landowner has a right to “subinfuedate” as a result of the Statute *Quia Emptores 1290* which can still be found on the Statute Law Database. All landowners hold land in fee directly or indirectly from the Crown.

In summary land held in demesne by the Crown have the following characteristics:

The Crown has dominion over that land as Lord Paramount; and

The Crown has no estate in land<sup>11</sup>.

The position of the Duchy of Cornwall in this hierarchy is confusing. The Duchy of Cornwall can hold demesne land, as can any lord of a manor, in the sense it is a landowner and has retained its interest in that land without granting any of it to his tenants. The Duchy, in modern usage, has a “mesne lordship” which is a landlord who has tenants while holding his land from a superior lord. This is referred to as a “Tenure” which denotes the holding of land by a tenant under his lord and is only appropriate where the feudal relation of lord and tenant exists<sup>12</sup>. The Duchy holds the Duchy in fee as tenant in chief of the Sovereign. The Duke of Cornwall is “a feudal tenant of the Queen like the rest of us”<sup>13</sup>. Thus as far as the freeholders in Cornwall are concerned the Duke stands between them and the Sovereign<sup>14</sup>. It is one of the few cases in which the second step of the feudal pyramid survives. The Duchy of Cornwall is one of the very rare examples where “mesne lordship” can be proved and has any continuing relevance. When “tenure” exists over a number of manors, as in the case of the Duchy is known as a “land barony” or “honour”.

In support of the above analysis the Land Registry relies on the Charter of 17<sup>th</sup> March 1337 which says:

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<sup>11</sup> Under Scottish Law it was possible to own land allodially, for example, by the church. The Abolition of Feudal Tenures etc (Scotland) Act 2000 provides that “the entire system whereby land is held by a vassal on perpetual tenure from a superior” was abolished from 28<sup>th</sup> November 2004. All land in Scotland is now allodial.

<sup>12</sup> Halsbury’s Laws of England Volume 39(2) Para. 75 Land and Interests in Land

<sup>13</sup> E Mail correspondence with Land Registry 12 March 2009

<sup>14</sup> E Mail correspondence with writer and Land Registry 14<sup>th</sup> January 2010

*“habendum et tenendum eidem duci et isius et heredum suorum regum Anglie filis primogenitis et dicti ducibus in regno Anglie hereditary successuris..de nobi et heredibus nostris impperpetuum.”*

“To have and to hold to the same Duke and the eldest sons of him and Heirs Kings of England and the Dukes of the same place hereditarily to succeed in the Kingdom of England....of us and his heirs for ever.”

“To have and to hold...of us and our heirs for ever” are standard words of infuedation by which a feudal superior grants to his tenants thus, the Land Registry claims, it is clear that the possessions of the Duchy are held feudally as tenant in chief of the Crown<sup>15</sup>.

There are those including, arguably, the Duchy who would challenge the above analysis. They claim that the Duchy holds the lands in Cornwall allodially. This point will be addressed shortly.

The Charter of Henry III granted to his brother Richard “..the whole county of Cornwall”; similarly the Charter of Edward II, to Piers Gaveston, allowed for a grant in like terms. The third Duchy Charter of 3<sup>rd</sup> January 1338 brought together the various provisions of the previous two Charters. Edward III provided that:

“....by this Our charter have confirmed to the said duke all Our fees, with appurtenances which We have in the said county of Cornwall or which do or shall belong or appertain to Us..”<sup>16</sup>

In *Chasyn v Lord Sturton* (1553)<sup>17</sup> it was confirmed:

“..the said county should be given to Edward the son as in the name of the Duchy; and that this county of Cornwall should always remain a duchy..without being otherwise disposed of...”

Similarly in the *Princes Case* (1606) Lord Coke said “...the whole county of Cornwall should always remain as a Duchy to the eldest sons of the Kings of England...”

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<sup>15</sup> E Mail correspondence 27 March 2009

<sup>16</sup> See Appendix C

<sup>17</sup> *Chasyn v Lord Sturton* (1553) (1Dyer 94a) p 205

Baron Adams in the *Sutton Pool Case*<sup>18</sup> stated: “When the Prince of Wales takes he takes an estate in fee-simple..” Later in the same case Chief Baron Parker, as some indication of the complexities which arise when considering the Duchy said:

“It is clear, that the Crown does not take an absolute fee, but only a qualified fee, till the birth of the King’s eldest son, and when there is a King’s eldest son he takes a fee but only a qualified fee till he comes to the Crown or till his own death.”

In other words a Duke holds only until he becomes King or, if the Duchy has reverted to the Crown for want of a Duke, the Duchy does not become absorbed in the Crown’s demesne but is held in “fee” until a Duke is born.

In *The Solicitor of the Duchy of Cornwall v the Next of Kin of Thomas Canning* (1880) the assertion was made and accepted that:

“The charters of the duchy have always been treated both by the Courts of Judicature and the legislature as having vested in the Dukes of Cornwall the whole interest and dominion of the Crown in and over the whole county of Cornwall.”<sup>19</sup>

The Duchy acknowledges it has a “special relationship with Cornwall”. It also points out only 13 per cent of the land it owns is within Cornwall which represents 2 per cent of the geographical area of the County<sup>20</sup>. While the percentages are no doubt accurate they do not reflect the full extent of the connection between the Duchy and the county of Cornwall. Indeed possibly they are intended to obscure that relationship.

Nowhere is the position of the Duchy so forcefully set out as in “Foreshore Case”<sup>21</sup> which includes the statement:

“..the Duchy Charters are sufficient to vest in the Dukes of Cornwall not only the government of Cornwall but the entire territorial dominion in and over the county which had previously been vested in the Crown”

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<sup>18</sup> *The Attorney General to HRH the Prince of Wales, Duke of Cornwall v The Mayor and Commonalty of the Borough of Plymouth and others* (1754) (Wight 134) p 1208

<sup>19</sup> *The Solicitor to the Duchy of Cornwall v Canning* (1880) (5 P.D. 114 Probate)

<sup>20</sup> [www.duchyofcornwall.org/faqs.htm](http://www.duchyofcornwall.org/faqs.htm)

<sup>21</sup> *The Tidal Estuaries, Foreshores and Under-Sea Minerals within and around the Coast of the County of Cornwall*.- Arbitration by Sir John Patteson (1855) Duchy Preliminary Statement p 9



Later in the same section:

“It cannot, therefore, reasonably be doubted that this *Royal Seignory consisted of the King’s demesne lands* (emphasis added), reversion, feudal services, rights and emoluments, with the prerogatives above enumerated, did, in fact, comprehend the whole territorial interest and dominion of the Crown in and over the entire County.”

In reply to a question from the Government Law Officers the Duchy answered:

“It is contended, that the Duchy in its creation was co-extensive with the County, in the sense in which that term is used: *not that its possessor was entitled to every acre of land in the County*, (emphasis added) but to the great seigniorial rights throughout the County, which under the circumstances, would have been vested in the Crown.”

Eight years after the Foreshore Dispute was arbitrated the Duchy remained quite insistent in its position regarding Cornwall. For example:

“...in so far as the County of Cornwall is concerned all rights previously vested in the Crown other than that of Royal jurisdiction were vested *jure ducutus* in the Royal personage whether the Sovereign or the Duke of Cornwall..”<sup>22</sup>

The most explicit claim made by the Duchy was set out in 1860 as follows:

“It is well known that the ultimate fees of all lands in England are vested in the Crown by reason of its prerogative in tenure and *are incapable of being transferred to a subject. But without doubt the ultimate fees of all lands within the County of Cornwall are by the express language of this 3<sup>rd</sup> Charter vested in the Duke of Cornwall* (emphasis added) and not only so but clothed with all those prerogative rights which would attach to those Fees in the hands of the Sovereign as fully as the Sovereign could have enjoyed them if (to use the language of this Charter) the Sovereign had retained the same fees in his own hands and that *non obstante prerogative*<sup>23</sup>. It seems difficult to support this or any other construction

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<sup>22</sup> TNA TS 25/1330 – Treasure Trove at Luxullian Cornwall (1864)

<sup>23</sup> Notwithstanding the prerogative

than that the Duke as regards these possessions was substituted for and holds them as the Representative of the Sovereign.”<sup>24</sup>

Shortly after, in 1862, the Trustees to the Duchy stated that the decision in the Cornwall Foreshore Case established:

“...His Royal Highness as the superior Lord of the soil of the entire County of Cornwall...”<sup>25</sup>

There are Kernowcentrics<sup>26</sup> who claim that the Duchy holds the whole of Cornwall allodially; that it is the absolute owner of the land. For them this is significant and one of the issues which indicate Cornwall’s unique relationship with the English state. The implication being that the Duke of Cornwall did not hold the land from the sovereign as a vassal but owned the land independently of feudal obligations. It would not be difficult to argue from the quotes above that the Duchy adopts a similar position. In an attempt to clarify the situation particularly in light of the passing of the *Quia Emptores* in 1290 the Land Registry was asked to answer the following question:

“Assume the Duchy wished to purchase freehold property in Truro and since the Duchy holds Cornwall in fee simple would the Duchy be granting a freehold interest to itself?”

The reply was:

“I do not really know the answer as to whether it is possible to hold a freehold interest of oneself, or whether that is technically what the result would be. I think it is possible because if the Crown Estate acquires freehold land by purchase I do not think the existing freehold comes to an end...In modern conditions the question has no practical consequences.. and probably has not since the Tenures Abolition Act 1660..”<sup>27</sup>

There is no clear answer to whether or not the Duchy owns Cornwall allodially or whether the Duchy has a freehold, or interest in land, in the whole of Cornwall. If the Duchy does hold Cornwall in fee simple then it does seem to be practicing subinfeudation

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<sup>24</sup> TNA TS 27/818 – Treasure Trove (1907-1932)

<sup>25</sup> Report to Her Majesty the Queen from the Council of H.R.H. The Prince of Wales 1862

<sup>26</sup> Angarrack, J., *Our Future is History* (2002). See also [www.duchyofcornwall.eu/latest/](http://www.duchyofcornwall.eu/latest/)

<sup>27</sup> E Mail from Land Registry to writer dated 17<sup>th</sup> June 2010

which has not been permissible since 1290. Whatever view is taken in one sense at least it is true that “The Duchy is Cornwall” even if “Cornwall is not the Duchy”. It is difficult to think of any comparable situation applying in a territory where the Queen is Sovereign. One cannot imagine, for example, the freehold in Staffordshire being granted to a subject of the Crown.

### *C Right to the Isles of Scilly*

The Duchy confidently asserts:

“The Isles of Scilly have been part of the Duchy of Cornwall since its foundation in the 14<sup>th</sup> Century.”<sup>28</sup>

The claim is supported by Government. For example in a letter dated 16<sup>th</sup> June 2009 from the Department of Communities and Local Government it was claimed:

“...the Isles of Scilly, including St Mary’s, have been part of the Duchy of Cornwall since the 14<sup>th</sup> Century....”<sup>29</sup>

Despite the assurance demonstrated in the statements quoted and the public functions performed by the Duchy there is some ambiguity in the Duchy’s claim to the Islands. For example, in the papers relating to the Cornwall Foreshore Case the Duchy observed:

It was also recited by the lawyers on behalf of the Duchy:

“These Islands, as before mentioned, were parcel of the Earldom, and held as of the Great Honor of Dunheved or Launceston; but although parcel of the Earldom, they are not expressly named in the Duchy Charter; but that the Seignory of these Islands did pass to the Dukes, though not specifically named in the Charter is clear from the *Inquisition Post Mortem* of Ranulph de Blanchminster, in the 22<sup>nd</sup> Edward III, eleven years only after the creation of the Duchy, which states that he held of the King no land in Cornwall, but that he held of the Lord Edward Duke of Cornwall the Castle of Sully with the Islands to the said Castle appertaining; and his heir being under age, the profits in the next year are accounted to the Duke.”

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<sup>28</sup> [www.duchyofcornwall.org/aroundtheduchy\\_islesofscilly.htm](http://www.duchyofcornwall.org/aroundtheduchy_islesofscilly.htm)

<sup>29</sup> Letter from Iain Wright M.P., Dept of Communities and Local Government and Local Government, to Andrew George M.P. 16<sup>th</sup> June 2009

As further evidence the Duchy cited an “Inrolment” of the Duchy of Cornwall of 22<sup>nd</sup> June 1637 by which the Scilly Isles were leased to Sir William Godolphin.

There are, however, those who have raised questions about the status of the Isles of Scilly. For example, Robert Heath in his 1750 study of the Scilly Isles:

"After the Dissolution of Abbies and monastical Estates, the ecclesiastical Jurisdiction of Scilly devolving to the See of Exeter, the Civil Power was granted by the Crown to Lords Proprietors, on Condition of their paying certain Rents into the Hands of the Receiver for the Dutchy of Cornwall, for the Tenure of those Islands; by which they came to be acknowledg'd as Part of the Jurisdiction of the said Dutchy; but only by the King's Favour: For I cannot find by any Records that they were ever annex'd thereunto.

And here I shall observe, that in the Grant of the Dutchy of Cornwall (which I have seen) to the Prince of Wales, as eldest son of England, there is no mention made of the Islands of Scilly...whence if Scilly appertains, or is part of the said Duchy, *it is rather permitted by Favour than given to be so by Royal Authority*; especially as the Grant of those Islands to several late Proprietors, is expressed in so ample a Manner."<sup>30</sup> (Emphasis added)

Later in 1824 Fortescue Hitchins wrote:

“When the county of Cornwall was erected into a Duchy, these islands seem either to have been forgotten or purposely omitted as they are not mentioned in the general grant. This omission has given rise to some disputes whether they belong to the Duchy or not. It is certain that some Kings of England have made separate grants of them when there have been Dukes of Cornwall; and when the dissolution of religious houses took place, the lands which belonged to the abbey of Tavistock fell to the Crown; and hence it is presumed, that the dominion of these islands accompanied their destiny. *If, therefore Scilly is now considered as a part of the Duchy, it is rather permitted by favour, than given so by royal authority.*”<sup>31</sup> (Emphasis added)

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<sup>30</sup> Heath, Robert, *The Isles of Scilly (A natural and historical account of the Islands of Scilly)* (First published 1750)

<sup>31</sup> Hitchins, Fortescue, *The History of Cornwall* (1824) Volume II page 687

The most significant challenge to the Duchy's claim to the Scilly Isles came in 1832/1834 when the case was examined by the Law Officers of the Crown who:

“...carefully examined the origin of several documents submitted to us together with the very able statements and arguments and elaborate searches which accompany them and we are of the opinion upon the whole that the Scilly Islands are to be considered as part of the properties of the Duchy of Cornwall and they do not belong to the Crown *jura coronae*<sup>32</sup> ..”

They also said:

“it is to be regretted that in a matter of so much importance there should not be a regular series of authentic public documents by referring to which the question between the Crown and the Duchy of Cornwall might be at once satisfactorily decided.”<sup>33</sup>

The papers do not reveal why the question was raised neither do they provide copies of the documents submitted.

Mary Coates, in her paper to the Royal Historical Society in 1927, offers a different explanation of how the Scilly Isles became part of the Duchy:

“*Annexata Maneria* added to the Duchy by subsequent Acts of Parliament....these included..fifteen manors confiscated by Henry VIII after attainder of Henry Courtenay, Marquis of Exeter...and lastly fifteen more obtained by the Crown through the dissolution of the Priories of Launceston and Tywardreth...in the list of the 15 Courtenay Manors we find....and the farm of the Scilly Isles.”<sup>34</sup>

The right to the Isles of Scilly is claimed by the Duchy relying to some degree on documents which predate the Charter of 1337 and arises by inference but is not without doubt and was submitted for an opinion by the Crown Law Officers.

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<sup>32</sup> Right of the Crown

<sup>33</sup> TNA CRES 58/742 - Scilly Islands (1832 – 1892)

<sup>34</sup> Coate, Mary, “The Duchy of Cornwall: Its History and Administration 1640 to 1660” (1927) *Transactions of the Royal Historical Society* p 147

*D Right to foreshore of Cornwall, fundus and mines and minerals under the foreshore and fundus of the riverbed.*

The Duchy has a right to the foreshore and undersea minerals of Cornwall, except when they are owned by a subject, as a consequence of the Cornwall Foreshore Case and the resulting Cornwall Submarine Act 1858.

Specifically the Duke of Cornwall, in right of the Duchy of Cornwall, has the right of all mines and minerals lying under the seashore between high and lower water marks within the County of Cornwall and under estuaries and tidal rivers and other places (below low water mark) being part of the county.<sup>35</sup>

The Duchy also owns the “fundus” or navigable river bed and foreshore of the Tamar, Camel, Helford, Fal, and Fowey together with what are known collectively as the Devon Waters being the Salcombe and Kingsbridge Estuaries, the River Dart and the River Avon. Therefore, since the pillars of the Tamar Bridges are located on Duchy property, a modest rent was negotiated by Brunel of £25 per annum.<sup>36</sup> It also means, for example, part of the toll paid by those catching the ferry from Plymouth to Torpoint and King Harry’s Ferry near Feock goes to the Duchy.

*E Right to search for and work mines in Accessionable Manors*<sup>37</sup>

There were originally seventeen Accessionable Manors belonging to the Duchy, six of which were sold for redemption of land tax in 1798. In these certain tenements (known as “conventional tenements”) were held by way of leases. The custom that possession of the minerals was in the tenant did not apply and, therefore, the Duke of Cornwall and his licensees were entitled to get the minerals without the consent of the tenant. The Duchy of Cornwall (No. 2) Act 1844 provides a code for the working of the minerals.

Halsbury’s Laws described the right as follows:

“Subject to certain restrictions ...the Duke of Cornwall and his lessees and persons authorised by him and their agents or workmen may enter land comprised in any of certain accessionable manors in which any mines, minerals, stone or

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<sup>35</sup> Halsbury’s Laws of England Volume 12(1) Crown Property 3 Foreshore and Wreck para.268

<sup>36</sup> Burnett, D., *A Royal Duchy* (1996) p 37

<sup>37</sup> Halsbury’s Laws of England Volume 12(1) – Casual Revenues Minerals paras. 225/226

substrata belong to the Duke and search dig for, open and work mines... In so far as it is necessary or convenient for working those mines...may erect buildings, steam and other engines, machinery and things, sink and make pits, shafts, levels, adits, air holes, tram and other roads and other works...and do other acts and things upon, under, in and about land. The surface owner is compelled to permit his land to bear these burdens and to be used for these purposes although he is not divested of his title in favour of the Duke.”

The Duchy has recently caused some consternation in certain areas of Cornwall by registering its mining rights. The registration has been necessary because of a Land Registry requirement and because valuable metals have recently been discovered in Cornwall such as iridium and tungsten<sup>38</sup> and the Duchy wishes to protect its interests<sup>39</sup>.

#### *F Right to Mines Royal?*

By prerogative right the Crown is entitled to all mines of gold and silver within the realm regardless of whether the mines are located on Crown land or on the land of a subject<sup>40</sup>. Even if a subject were to be granted lands with all mines in them Mines Royal would be excluded<sup>41</sup>. The Crown Estate website was unambiguous:

“Today, the prerogative right to gold and silver are part of the Crown Estate. This is true for all of the UK although in the past, in some limited areas in Scotland, this right has been transferred from the Crown by ancient charter.”<sup>42</sup>

Since enquiries under the Freedom of Information Act 2000 were made of the Crown Estate the website has been changed and the above statement is no longer included.

The dispute arising in the nineteenth century between the Duchy who claimed the right to Mines Royal in Cornwall and the predecessors to the Crown Estate, the Commissioners of Woods, Forest and Land Revenues has already been outlined. The matter remains unresolved: the Duchy continues to claim Mines Royal, as confirmed in correspondence

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<sup>38</sup> See *Times* “Australians want Cornish mines to rise again” 26<sup>th</sup> March 2012. It seems Tungsten is a “geological bedfellow of tin”

<sup>39</sup> See *Western Morning News* “Duchy quells fears of mining under homes” 13<sup>th</sup> February 2012

<sup>40</sup> *Case of Mines* (1567) (1 Plowd 310 at 315-316 Ex Ch.)

<sup>41</sup> Crown Estate File 64-00-11 28 January 1988

<sup>42</sup> [www.thecrownestate.co.uk/our\\_portfolio/rural/minerals.htm](http://www.thecrownestate.co.uk/our_portfolio/rural/minerals.htm)

with the Attorney General to H.R.H. the Prince of Wales<sup>43</sup>, and the Crown Estate persists in its denial of such claims.

The Royal Mines Acts of 1688 and 1693 provided essentially if gold or silver were a by product of mining for tin, copper, iron or lead (with certain saving provisions to protect the Stannaries) the subject could continue to enjoy the mine. The Acts do not make special provision for the Duchy of Cornwall.

The matter was raised by the solicitor to the Duchy on 16<sup>th</sup> June 1980.<sup>44</sup> No new evidence was provided and the Crown Estate maintained its position. They insist “that it is for the Duchy to establish as against the Crown, its right to Mines Royal”<sup>45</sup>. The Crown Estate had, for many years, been granting licenses to various companies to prospect for gold and silver within Cornwall without reference to the Duchy. Indeed they said they saw “no reason why the (Duchy) should be informed”<sup>46</sup>. A provision of the Limitation Act 1980 section 37(6) was noted, however. As observed by the Crown Estate this says:

“Nothing in this Act shall affect the prerogative right of Her Majesty (whether in right of the Crown or of the Duchy of Lancaster) or of the Duke of Cornwall to any gold or silver mine.”<sup>47</sup>

A Legal Adviser to the Crown Estate gave his opinion that the section was not decisive “about the existence Mines Royal rights in the Duke of Cornwall.....(It is) however a statutory sign-post to the possible existence of such rights.”<sup>48</sup> In the same memo he said “The Duchy’s protective efforts go back a long way”. The persistence of Duchy claims, the fact the Duchy tends to expect others to accept the opinions of Government Law Officers when they are in their favour but they appear unwilling to agree to them when they are adverse to Duchy interests is apparent.

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<sup>43</sup> Letter to writer from Mr Jonathan Crow, Q.C. Attorney General to H.R.H. the Prince of Wales 24<sup>th</sup> October 2011

<sup>44</sup> Crown Estate File 64-00-11

<sup>45</sup> Crown Estate Memo 2 February 1988 J Stumbke Legal Adviser

<sup>46</sup> Crown Estate Memo 3<sup>rd</sup> February 1988 M L Davies Legal Adviser

<sup>47</sup> Limitation Act 1980

<sup>48</sup> Crown Estate File 64 00 13 Memo 30<sup>th</sup> September 1996



In 1996 the Duchy solicitors wrote to the Crown Estate advising they had been instructed by the Duchy to agree that the Crown Estate:

“continue to authorise prospecting licences throughout the country, including Cornwall without prejudice to the Duchy’s claim.

If workable deposits are discovered, then the Duchy reserves its full rights in relation to them and would expect to grant an operating license.”<sup>49</sup>

In September 2000 Guinness, then the sponsors of Six Nations Rugby, intended to commission a trophy to be made from gold from England, France, Ireland, Italy, Scotland and Wales. The English gold was to come from Hope’s Nose in Cornwall. The question was how was legal title to be obtained for the English gold<sup>50</sup>. The enquiry was not passed to the Duchy, “so far as it relates to Cornish gold...which might imply that we recognize that they have exclusive rights.”<sup>51</sup> The delay in getting a response was such that sadly the matter was never pursued and the proposed trophy was not produced.

The matter rests with both sides maintaining their positions. The Duchy claims Mines Royal in Cornwall and the Crown Estate rejects the claim. However, one can be sure if a Mine Royal were to be developed in Cornwall then the issue would be vigorously pursued by both sides. After more than one hundred and fifty years neither the Crown nor the Duchy appears ready to concede.

### *G Right to Escheat*

This right is described in Joseph Chitty as:

“..the last fruit or incident resulting from the feudal system. It was a species of confiscation by which the feu reverted to the sovereign...”<sup>52</sup>

Escheat is the capacity of the chief lord to resume land granted by him or a predecessor in title on determination of the estate granted. It applies only when a freehold estate determines. In Cornwall it passes to the Duchy by virtue of the Duchy’s estate in fee simple. The lord to whom the land reverts completes the escheat only when he takes

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<sup>49</sup> Letter from Farrer & Co 20 September 1996 to Crown Estate Office

<sup>50</sup> Letter Wardell Armstrong Crown Mineral Agent 15 September 2000 to Crown Estate.

<sup>51</sup> Crown Estate Memo 3 October 2000 File Number 64 00 13 D Harris Legal Adviser

<sup>52</sup> Chitty, op. cit. p 213

possession or control of it or takes proceedings for its recovery. The circumstances in which escheat occurs are as follows:

- 1 where freehold land is disclaimed in cases that normally involve insolvency as when a trustee in bankruptcy disclaims onerous property under Insolvency Act 1986 section 315 or a liquidator of a company disclaims under section 178 of the Insolvency Act 1986;
- 2 where under Companies Act 1985 section 654 a company is dissolved and the property is disclaimed. This is the most common reason for escheat. (The address of the Registered Office of the Company determines whether the matter is dealt with by the Duchy of Cornwall or Lancaster or the Treasury Solicitor.); and
- 3 Escheat can also arise on dissolution of a foreign company, or an Industrial and Provident Society ceasing to exist or on dissolution of a statutory company.<sup>53</sup>

The position as set out above is based on the Law Commission Report 2001 and advice provided by the Land Registry who said:

“The Duke’s right to escheat in respect of land in Cornwall is not in doubt (see e.g. *Re Canning, Solicitor to the Duchy of Cornwall v Canning* (1880) (5 PD 114))”<sup>54</sup>

However the solicitor to the Duchy of Cornwall raised some doubts whether that analysis is correct. In a letter to the Crown Estate Office in February 1988 he wrote<sup>55</sup>:

“The original Charter of 1337 granted to the Dukes of Cornwall a number of specific manors, particularly in Cornwall but also elsewhere in the Country, together with various rights, including “Wards Reliefs Escheats and services of Tenants”. The precise significance is a little unclear. It could either mean that the Duchy was simply being granted normal Escheats within each manor...or it could

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<sup>53</sup> See Law Commission and HM Land Registry Land Registration in the 21<sup>st</sup> Century: A Coveyancing Revolution, Law Com 271 (2001) page 252 for a fuller explanation

<sup>54</sup> E Mail to writer from Land Registry 14<sup>th</sup> January 2010

<sup>55</sup> Letter solicitor to the Duchy of Cornwall M. H. Boyd-Carpenter to Crown Estate Office 24<sup>th</sup> February 1988

have wider significance. The wider significance is not unconnected with the general scope and nature of the Duchy's rights in Cornwall and elsewhere..”

It is claimed that the Duchy's right of escheat included the honours of Trematon, Launceston and Bradninch only<sup>56</sup>. Chynoweth points out during the Tudor period both the Crown and the Duchy appointed escheators for Cornwall. The Duchy's escheator enquired into lands which were reputed to be held of itself<sup>57</sup>. This would confirm the doubt raised in the letter from the Duchy's solicitor.

As a result of considerable confusion in the seventeenth century when the Crown attempted to revive its feudal revenues:

“...it appears that an agreement was reached between the parties in 1620...(The agreement) does not deal specifically with escheats but was taken to extend to escheats.

The result of the agreement is that in return for the Duchy conceding feudal rights in the country elsewhere, the Crown conceded the Duchy's feudal rights throughout Cornwall.”

In conclusion Mr. Boyd Carpenter suggested:

“The present position, therefore, is somewhat unsatisfactory, and I think it would be sensible to resolve it by agreement.

It would therefore probably be sensible to confirm the (1620) Agreement, and we could at the same time define the boundary. In general terms, I believe that the boundary of Cornwall in 1337 and in 1620 was the same as it is now... it may be sensible to expressly to confirm that Cornwall includes the Isles of Scilly.”

The matter came up for discussion again in 1998 in correspondence between the Crown Estate and Farrer & Co, solicitors to the Duchy of Cornwall. In a letter Farrer & Co said in relation to the 1620 Agreement:

“I have some doubts as to whether the Articles of Agreement are legally binding because the Duchy had no power to dispose of lands or interests in land before 1844 except under specific parliamentary authority. Nevertheless these have now

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<sup>56</sup> Clowes, R. L., “Escheators of Devon and Cornwall” (1930-31) *Devon and Cornwall Notes and Queries* Volume XVI p 201

<sup>57</sup> Chynoweth, J., *Tudor Cornwall* (2002) p 202

stood for many years and I think it sensible to operate on the basis that the Agreement of 1620 still operates.”<sup>58</sup>

The Crown Estate in a response dated 5<sup>th</sup> June 1998 pointed out the Agreement of 1620 made no mention of escheats to which Farrer & Co responded by saying:

“I have considerable doubt whether the terms of the Articles of Agreement could under the Duchy Charter be made binding on subsequent Dukes..”<sup>59</sup>

The Duchy would appear to have acquired a right to which it was not originally entitled. The matter is now covered by Statute.

In summary if escheat arises within the rest of England then that estate in land would cease and the land will fall to the Crown in demesne. If, however, the freehold property is in Cornwall and escheat arises then that estate in land would become submerged in the “fee” owned by the Duchy of Cornwall as “mesne” lord.

### *H Right to bona vacantia*

The term *bona vacantia* is now applied to the estate of persons dying wholly or partially intestate and without persons within the statutory classes. The legal basis and effect of the transfer of the Crown’s *bona vacantia* function to the Duchy is illustrated by the Privy Council’s analysis of the similar transfer of function involving the Duchy of Lancaster in *Dyke v Walford* (1846)<sup>60</sup>. In simple terms there are no legal heirs. It also applies to property and rights of a dissolved company and certain other corporations and, finally, certain other interests including certain interests in trust property<sup>61</sup>.

*Bona vacantia* is vested in the Crown either as monarch or as Duke of Lancaster. However within Cornwall *bona vacantia* vests in the Duchy<sup>62</sup>.

Mr. Ross, as he then was, Secretary and Keeper of the Records of the Duchy of Cornwall, when appearing before the Public Accounts Committee of the House of Commons on 7<sup>th</sup>

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<sup>58</sup> Letter 13 May 1998 from Farrer & Co to Crown Estate

<sup>59</sup> Letter dated 10 June 1998 from Farrer & Co to Crown Estate

<sup>60</sup> *Dyke v Walford* (1846) (5 Moo PCC 434 at 495)

<sup>61</sup> Halsbury’s Laws of England Volume 12(1) Crown Property/Casual Revenue para. 235

<sup>62</sup> Administration of Estates Act 1925 section 46/Companies Act 1925 section 1012

February 2005<sup>63</sup> on behalf the Duchy in answer to a question regarding *bona vacantia* stated:

“This is one of the traditional things we have inherited.”

The money vested in the Duchy by right of *bona vacantia* for the year ending 31<sup>st</sup> March 2012 was £552,000<sup>64</sup> (2011 £75,000)<sup>65</sup> is, after various deductions, placed in the Duke of Cornwall’s Benevolent Fund, a registered charity. Mr. Ross explained:

“It is a charity. It is used for education religion etc. We try to focus it back into the area from which it has come.”

The Duchy of Cornwall website states the money is used in the South West. Since the funds all come from Cornwall you would expect it all to be spent in Cornwall. A large part is, but not all.

To summarise: the estate of someone who dies in Somerset without a will and without statutory heirs would pass to the Crown. However, if a similar situation arose in Cornwall it would pass to the Duchy of Cornwall.

## *I Right to Royal Fish*

Royal fish were one of the casual revenues reserved to the Crown by the statute *De Prærogativa Regis* 1324.<sup>66</sup> The right applies to fish taken in the seas forming “parcel” of the Crown’s or Duchy’s dominions. If taken in the wide seas they belong to the taker<sup>67</sup>. On the capture of a whale “in the narrow seas adjoining the coast, being a royal fish, the head belongs to the King while the tail belongs to the Queen<sup>68</sup>”; presumably in the case of the Duchy of Cornwall between the Duke and Duchess. Blackstone wrote that “the reason for this whimsical division, as assigned by our ancient records, was to furnish the Queen’s wardrobe with whalebone. The reason is more whimsical than the division, for

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<sup>63</sup> House of Commons Public Accounts Committee 7<sup>th</sup> February 2005

<sup>64</sup> Duchy of Cornwall Accounts 31<sup>st</sup> March 2012

<sup>65</sup> Rayner, Gordon “£1 million for those without wills passes to Prince Charles’ estate” *Telegraph* 3<sup>rd</sup> October 2012

<sup>66</sup> Karraker, Cyrus H., “Royal Fish” (1936) *Quarterly Review* Vol 267 pp 129-136

<sup>67</sup> Halsbury’s Laws of England Volume 12(1) 229 *Crown Property Casual Revenues Royal Fish*

<sup>68</sup> Halsbury’s Laws of England vol. 8, para. 959

the whalebone lies entirely in the head.”<sup>69</sup> Whale oil, of course, was valuable as was the blubber and meat. Porpoises, grampuses and sturgeons were regarded as great delicacies.

The right was once valuable. Today it is likely to be costly since the Duchy has the obligation to remove any such Royal Fish washed up on the foreshore for which it is responsible. As an illustration of this a whale was recently washed up on the North Cornwall coast. The Marine Coastguard Agency advised that it can cost as much as £50,000 to remove since a whale now represents a health hazard containing as they do all sorts of toxic chemicals<sup>70</sup>.

### *J Right to wrecks*

This was a right which the Duchy decided to reassert during the nineteenth century after allowing it to lapse for some time because some: “..small revenue may now therefore be anticipated from this source without material expense to the Duchy.”<sup>71</sup>

The full extent of this right has been the topic of considerable correspondence between Government and the Duchy. There is one file in the National Archive which is thick with papers dating from 1856 to 1985<sup>72</sup>. For a wreck to be a wreck, until recently, it must form part of a ship<sup>73</sup> and must come to land<sup>74</sup>. It did not comprise “droits of Admiralty” which included flotsam, (goods lost from a ship which has sunk or perished but which have floated), jetsam, (goods cast overboard to lighten a vessel) and lagan, (goods cast overboard but buoyed so that they could be recovered later. The final “droit of Admiralty”, derelict, property, including vessels abandoned and deserted without hope of recovery, was claimed by the Duchy as late as 1985 but was never conceded by the Government<sup>75</sup>. The point is now mute since the definition of wreck includes the “droits of Admiralty.”<sup>76</sup>

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<sup>69</sup> Blackstone, Sir William, *Commentaries on the laws of England Volume 1* (1832) p 169 et seq

<sup>70</sup> See for example Law, R.R., et al *Metals and organochlorines in tissues of a Blainville’s beaked whale (Mesoplodon densirostris) and a killer whale (Orcinus orca) stranded in the United Kingdom* (1997) Marine Pollution Bulletin 34:208

<sup>71</sup> Report to H.M. The Queen from the Council of H.R.H. Prince of Wales (1862) p 15

<sup>72</sup> TNA BT 243/262 – The Duchy of Cornwall: Legislation relating to right of wreck of the sea (1856 – 1985)

<sup>73</sup> Merchant Shipping Act 1995

<sup>74</sup> *Sir Henry Constables Case* (1601) (5 Co Rep 106a)

<sup>75</sup> TNA BT 243/262 op. cit

<sup>76</sup> Merchant Shipping Repeal Act 1854 section 10

### *K Right to Treasure Trove*

The rules regarding treasure trove traditionally provided that any gold or silver in coin, plate or bullion found deliberately concealed in a house or in earth or other private place with the intention of recover, the owner thereof being unknown, belonged to the Crown or a grantee having franchise of treasure trove. The Treasure Act 1996 replaces the old provisions. Treasure found in whatever the circumstances in which it was left vests in the franchisee, if there is one, or the Crown<sup>77</sup>. Within Cornwall the right to Treasure Trove belongs to the Duchy unless there is a franchisee<sup>78</sup>.

### *L Right to “Prick” or appoint the High Sheriff of Cornwall*

It is the Duke of Cornwall and not the Crown who appoints the High Sheriff for Cornwall. This right pre-dates the Charter of 1337 dating back to the 13<sup>th</sup> Century and the Earls of Cornwall. The position of High Sheriff is now largely ceremonial though in times past the Sheriff was an important person with considerable powers having control of the Duchy government and courts. The opening words of the oath taken by the High Sheriff’s of Cornwall are:

“I **XXXX** do swear that I will well and truly serve as the well the Queen’s Majesty as His Highness **XXXX** Duke of Cornwall in the office of Sheriff of the County of Cornwall and promote Her Majesty’s and His Royal Highness’s profit in all things that belong to my Office as far as I legally can or may.....”<sup>79</sup>

### *M Right to summon the Convocation of the Tinnars of Cornwall*

This topic has been explored already. The Duke of Cornwall, through the Lord Warden of the Stannaries has, at least the theoretical right, to summon the Convocation of the Tinnars of Cornwall and Devon and to give Royal Assent to Acts passed by it.

If this right still exists it must extend to the equivalent Convocation in Devon.

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<sup>77</sup> Halsbury’s Laws of England Volume 12(1) Crown Chattels and Personality para. 373

<sup>78</sup> Halsbury’s Encyclopedia of Forms and Precedents vol. 29 para. 104. See also TNA TS 25/1330 Treasure at Luxulian (1864)

<sup>79</sup> Cornwall Record Office QS 12/16/5

### *N Right to “present clerical livings”*

The possessor of the Duchy holds advowson, which is has the right to present a nominee to certain parishes of the Church of England when a vacancy arises. This is a property right (an “incorporeal hereditment”). The Duke of Cornwall makes representations to the relevant Bishop in relation to any choice. The Bishop has to agree any appointment.

The relevant parishes are: Calstock, Lanteglos by Camelford, Stoke Climsland, the Isles of Scilly, St. Domic, Landulph and St. Mellion with Pillaton (joint patron), St Buryan, St. Levan and Sennen, St. Tudy with St. Mabyn and Michaelstow (joint patron), Stratton and Launcells, Egloskerry, North Petherwin, Tremaine and Tresmere (joint patron), Boyton, North Tamerton, Werrington with St. Giles in the Heath and Virginistow (joint patron) and Boscastle with Davidstow (joint patron).<sup>80</sup>

This seemingly unremarkable privilege was the subject of a secret Cabinet Paper in 1924 entitled “Measures of the National Assembly of the Church of England”<sup>81</sup>. It was discussed again in 1937 when a question was raised about who had the right to exercise the “Ecclesiastical Patronage of the Duchy of Cornwall” when there was no Duke<sup>82</sup>.

It was concluded the Sovereign exercised the right as if he were Duke.

### *O Rights applicable to the solicitor to the Duchy of Cornwall and the Attorney General to H.R.H. the Prince of Wales; Duke of Cornwall*

This means the Attorney General to the Prince of Wales being a barrister or the solicitor to the Duchy of Cornwall need not be called to the English and Welsh Bar (if a barrister) or hold a practicing certificate (if a solicitor) although they invariably do<sup>83</sup>.

The Stannaries Act 1855 Section 31 says:

“Whenever any person shall be appointed by his Royal Highness the Prince of Wales....at act as attorney or solicitor in the affairs of the said Duchy...it shall be lawful for such person to act and practice....any statute, order, rule, usage, or

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<sup>80</sup> Mr Walter Ross, Secretary and Keeper of the Rolls 18<sup>th</sup> July 2011

<sup>81</sup> TNA CAB 24/166 - Measures of the National Assembly of the Church of England (1924)

<sup>82</sup> TNA LO 3/1177 - Ecclesiastical Patronage of the Duchy of Cornwall (1937)

<sup>83</sup> Stannaries Act 1855 Section 31, Solicitor Act 1974 Section 88 and Legal Services Act 2007 Section 193



custom relating to attornies or solicitors, or the admission, inrolment, or practice of attornies or solicitors to the contrary notwithstanding.”

*P The right of the Prince of Wales, Duke of Cornwall to be represented by his own Attorney General*

It is clearly decided that the Prince of Wales does enjoy such a right which is unique for someone defined as a subject of the Crown<sup>84</sup>.

*Q Right not to pay tax*

This right will be examined further in the next Chapter which considers the Duchy’s enjoyment of Crown Immunity.

*R Right to Crown Immunity*

This will be examined in the following Chapter.

*S Right of Prince of Wales to give consent to Parliamentary Bills in relation to interests of the Duchy of Cornwall*

Please see the succeeding Chapter for a full discussion of this right.

*T Right of the Duchy not to be extinguished for want of a Duke*

There may not be a Duke but there is always a Duchy. From 1900 until 1936 there was a Duke of Cornwall. From 1936 until 1952 there was no Duke of Cornwall. There has been a Duke of Cornwall since 1952 albeit a minor until 1969. Sometimes the Duchy is in the hands of a “subject of the Crown”, sometimes in the hands of the Crown.

*U Conclusion*

Many of the rights set out above are the source of substantial income for the Duchy. The right to the foreshore means the Duchy receives revenue from those wishing to park on certain Cornish beaches or operate surf schools and so on. It charges mooring fees on those rivers where it owns the fundus. Similarly its right to the Isles of Scilly, to the frustration of some on those Islands, is a valuable asset.

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<sup>84</sup> *Attorney General to H.R.H., Prince of Wales, Duke of Cornwall v Sir John St. Aubyn and others* (1811) (Wight 167)

The right to *bona vacantia* and escheat do not arise often and the money which is raised is now largely devoted to charitable purposes. The figures are not insignificant as the over £500,000 received in 2012 demonstrates.

There are rights which the Duchy fought to assert when they were regarded as a possible source of income, for example, the right to wreck. Now they have the potential to be an embarrassing liability and the Duchy prefers to disclaim them if it can.

The persistence with which the Duchy pursues its claims over long periods is evident as is the reliance on charters predating the Great Charter of 17<sup>th</sup> March 1337 to demonstrate its entitlement to some of the rights it claims or enjoys.

The unique position of Cornwall in relation to the rest of the United Kingdom is nowhere better illustrated than the fact that the whole county is, depending upon your point of view, either owned allodially or is held by the Duke in fee from the Crown. Consider if the Duchy of Devonshire, a private estate, held the whole of Devon in fee and therefore enjoyed the rights arising from that situation. “The Duchy is Cornwall”, despite the assertion to the contrary made by the Duchy and Government. The Duchy does not simply enjoy a special relationship with Cornwall it either owns the lands of Cornwall or holds a “legal estate” in the whole county.



## Chapter 9

### The Duchy, Parliamentary Usage, Crown Immunity and Taxation

***“WE ARE OF OPINION THAT the same principles which render the provisions of an Act of Parliament inapplicable to the Crown unless the Crown is expressly named, apply also to the Prince of Wales in his capacity as Duke of Cornwall.”<sup>1</sup>***

#### A Introduction

The Duchy has a “right” to be consulted and give consent to legislation which affects its interests. This procedure is not a matter of constitutional nicety. A “private estate” whose head is a “private citizen” and a subject of the Crown is consulted on laws affecting its interest (“hereditary revenues, personal property or other interests”<sup>2</sup>). It is difficult to discover how the procedure operates and what, if any, changes are made to accommodate the requirements of that “private estate”. The Duchy also enjoys the benefit of “Crown Immunity”.

In this Chapter the practical implications of the above rights will be examined, including the advantages they offer to the Duchy and Duke of Cornwall. The legal basis upon which they are founded will be also considered.

#### B The Constitutional Position of the Prince of Wales, Duke of Cornwall

Prince Charles has been accused of meddling in Government policy<sup>3</sup>. He is quoted as saying “What some people call meddling I call mobilising.”<sup>4</sup> It is no part of this thesis to defend or attack the Prince of Wales. Suffice to say he is placed in a difficult position. Born in 1948 he has been heir to the throne since 1952 and has become the longest serving of all the Dukes of Cornwall. He is now at an age when many people are thinking about retirement. If his mother enjoys longevity similar to that of his grandmother he may be waiting for over a decade before ascending to the throne. He is clearly concerned

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<sup>1</sup> TNA LO 3/467 - Duchy of Cornwall Land Tax and valuation (1913)

<sup>2</sup> Letter from Dept. of Education to writer dated 4<sup>th</sup> August 2011

<sup>3</sup> See for example *Mail on Sunday* 3<sup>rd</sup> July 2011 article entitled “H.R.H. The Prince Minister: Charles accused of meddling after he summons seven senior Ministers to Clarence House in just ten months”. See also the *Guardian* 21 August 2011 “Royal charities lobbied ministers and officials”

<sup>4</sup> *Guardian* 21 August 2011 “Royal charities lobbied ministers and officials”

about the world in which he finds himself and, because of his position, is able to influence events in ways which he regards as beneficial. He has chosen the role of “..seeking to make a difference – not as King but as Prince of Wales.”<sup>5</sup>

His constitutional situation is ambiguous it: “...has appeared to be rather unclear and largely unexplored.”<sup>6</sup> The Prince has “...acknowledged that there is no established constitutional role for the heir to the throne.”<sup>7</sup> Whether deliberate or not, Prince Charles appears to have taken advantage of that ambiguity to carve out a role for himself unlike that of any of his predecessors and, possibly, create a new constitutional convention.

The legal texts are clear:

“The Heir Apparent and his wife occupy the same legal status as private citizens apart from *the special privileges he enjoys as Duke of Cornwall.*”<sup>8</sup> (emphasis added)

The Courts are unambiguous:

“..the Prince of Wales, even with regard to the possessions of the Duchy of Cornwall, was only to be considered as other subjects would be...”<sup>9</sup>

According to “Extracts from Shorthand Writers Notes – 21<sup>st</sup> May 1817” Lord Redesdale in the House of Lords in the case of “*Sir John St Aubyn and Others....Appellants and The Attorney General of the Prince of Wales and Another.....Respondents*” said:

“That Charter (the Charter of 17<sup>th</sup> March 1337) does not according to my recollection contain a communication of Privileges or Prerogatives of the Crown or give the Prince of Wales to whom the Charter was originally granted according to the terms of the Charter any rights which did not exist in the Earls of Cornwall prior to the issuing of that Charter and nothing can be found as far as I have been able to trace the evidence on the subject to show that the Earls of Cornwall had any rights beyond those of other subjects under similar grants – *therefore looking to the Charter itself it will be extremely difficult as it seems to me to find that the*

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<sup>5</sup> *Evans v Information Commissioner and Others* (2012) (UKUT 313 (AAC)) p 3

<sup>6</sup> Brazier, R., “The constitutional position of the Prince of Wales” (1995) *Public Law* p 401

<sup>7</sup> *Evans v Information Commissioner and Others* (2012) (UKUT 313 (AAC)) p 3

<sup>8</sup> Halsbury’s Laws of England Volume 12(1)/ 3 The Royal Family para. 31

<sup>9</sup> *Attorney General to H.R.H. Prince of Wales, Duke of Cornwall v The Mayor and Commonalty of the Borough of Plymouth* (1754) (Wight 134)

*Prince of Wales as Duke of Cornwall stands in any other relation than that of a Subject considering him merely as Duke of Cornwall.”*<sup>10</sup> (emphasis added)<sup>11</sup>

Despite what is said above it is surely sensible for the heir to the throne to be instructed in the business of government to prepare him for kingship. This was sometimes called the “Apprenticeship Convention” although the term “Educational Convention” is now preferred<sup>12</sup>. What is novel, however, is Prince Charles apparently appropriating rights similar to those enjoyed by the Sovereign which are, to quote Bagehot’s famous dictum:

“..the right to be consulted, the right to encourage, the right to warn.”<sup>13</sup>

While Prince Charles enjoys many splendid titles including Prince of Wales, Prince and Great (or High) Steward of Scotland<sup>14</sup>, Duke of Rothesay, Earl of Chester, Baron Renfrew and Lord of the Isles, it is as Duke of Cornwall and primarily as Duke of Cornwall that he has come to enjoy constitutional privileges and benefits not available to other “private citizens” or “subjects of the crown”. It is as the Duke of Cornwall that Prince Charles has a right to be consulted and give consent to legislation and enjoys the right to Crown Immunity<sup>15</sup>. So while Prince Charles may have collected unto himself, by default, various other rights it is those privileges he enjoys as Duke of Cornwall with which we shall now be concerned.

### *C The Prince of Wales’ Consent*

Erskine May’s *Treatise on the Law, Privileges, Proceedings and Usages of Parliament*, 23<sup>rd</sup> Edition said:

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<sup>10</sup> TNA TS 27/818 - Treasure Trove (1907 – 1932)

<sup>11</sup> Although the quote comes from a document contained within the National Archive record its origin is not clear. There is no record of a case being read before the House of Lords and no reference in Hansard.

<sup>12</sup> For an examination of the conventions with regard to the heir to the throne see *Evans v ICO and Others* (2012) (UKUT 313 (AAC))

<sup>13</sup> Bagehot, Walter, *“The English Constitution”* Ed. Richard Crossman (1963) p 111

<sup>14</sup> The titles Prince and Great (or High) Steward of Scotland appear to be inseparably connected. The Great (or High Steward) of Scotland is a hereditary office dating from the twelfth century. The designation “Principality of Scotland” implies not Scotland as a whole but the lands in Renfrew and the Stewartry appropriated as the patrimony of the monarch’s eldest son for his maintenance. (See Office of Parliamentary Counsel – Queen’s or Prince’s Consent” para 47 Appendix L)

<sup>15</sup> On very rare occasions the consent as Prince and Steward of Scotland has been requested particularly in connection with changes to land and feudal law in Scotland. It is possible it has now been superseded altogether. There have also been a very few circumstances in which the consent of the Prince of Wales as Prince of Wales has been obtained (See Office of Parliamentary Counsel – Queen’s or Prince’s Consent” para 46 et seq. Appendix L)

“Bills affecting the prerogative (being powers exercisable by the Sovereign for the performance of constitutional duties on the one hand, or, hereditary revenues, personal property or interests of the Crown, the Duchy of Lancaster or the Duchy of Cornwall on the other), require the signification of Queen’s consent in both Houses before they are passed. *When the Prince of Wales is of age, his own consent as Duke of Cornwall is given.* (emphasis added)”<sup>16</sup>

The 24<sup>th</sup> Edition of Erskine May<sup>17</sup> uses a significantly different formulation as follows:

“The Prince’s consent is required for a bill which affects the rights of the principality of Wales, the earldom of Chester or which makes specific reference or makes special provision for the Duchy of Cornwall. The Prince’s consent may, depending on circumstances, be required for a bill which amends an act which does any of these things. *The need for consent arises from the sovereign’s reversionary interest in the Duchy of Cornwall.*” (emphasis added)

The House of Lords Act 1999 is an example of why reference to the Principality of Wales and the Earldom of Chester were imported. Since these are, in effect, life peerages agreement had to be obtained that Prince Charles would surrender his right to sit in the House of Lords<sup>18</sup>. The changes, however, are viewed in some quarters with deep suspicion:

“...(the text was altered) so as to mislead the enquirer and disguise the extant constitutional position of the Duchy of Cornwall. The intention was to diminish the status of the Duchy by spuriously including the “Principality of Wales and the Earldom of Chester.”<sup>19</sup>

A Freedom of Information request was sent to the House of Commons asking for sight of the background papers leading to the change. The reply received was:

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<sup>16</sup> Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament (23<sup>rd</sup> Edition) (2004) pages 708-710. See also Parliamentary Counsel [http://www.cabinetoffice.gov.uk/making-legislation-guide/queens\\_consent.aspx](http://www.cabinetoffice.gov.uk/making-legislation-guide/queens_consent.aspx). Also e mail from Adrian.Hitchins@parliament.uk to writer.

<sup>17</sup> Erskine May’s Treatise on the Law, Privileges and Usage of Parliament (24<sup>th</sup> Edition) (2011) pages 684-688

<sup>18</sup> Jack, Sir Malcolm, (Ed.) *Erskine May – Parliamentary Practice 24<sup>th</sup> Edition* (2011) p 663

<sup>19</sup> [www.duchyofcornwall.eu/latest/](http://www.duchyofcornwall.eu/latest/)

“The House of Commons does not hold copies of the papers and documents in which changes..were considered or any papers which decided a change was necessary.”

They also pointed out:

“Erskine May is copyright of the May Memorial Fund Trustees, registered charity 306057. The May Memorial Trust is not a public body under the Freedom of Information Act.”<sup>20</sup>

There is a distinction between the “assent” of the Sovereign which is necessary for all Bills before they become an “Act of Parliament” and the “consent” of the Sovereign to a Bill which affects her “hereditary revenue, personal property or other interest”. In the latter case “consent” is required before a Bill can be introduced to Parliament. When consent to a Bill, which requires it, has been withheld by the Sovereign the Bill was withdrawn<sup>21</sup>. Where such consent by the Sovereign has been inadvertently omitted and the Bill has been read a third time, and passed, the proceedings have been declared null and void<sup>22</sup>. On the advice of Ministers the consent of the Sovereign is refused as a means to block the progress of a private members bill<sup>23</sup>.

While the consent of the Sovereign as outlined above is a matter of constitutional law the consent of the Duke of Cornwall is a matter of Parliamentary usage (or procedure) only. No record has been found of consent being withheld or inadvertently omitted by the Duchy of Cornwall. If such circumstances were to arise there is no authority to suggest that a Bill passed without consent would not pass into law. Consent only relates to the aspects of any Bill that affect the interest of the Duchy<sup>24</sup>. If consent were to be refused the question on the relevant stage of the Bill would not be proposed. The Duchy states its consent has never been withheld. It is not known if Bills have been changed to accommodate the views of the Duchy or the Duke of Cornwall. Of course, unlike the

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<sup>20</sup> E Mail to writer from Head of Information Rights and Information Security dated 28<sup>th</sup> February 2012

<sup>21</sup> See 76 Lords Journals 478, 504; 121 Commons Journals 423; 191 Official Report (3<sup>rd</sup> series), 29 April 1868, col. 1564

<sup>22</sup> See 107 Commons Journals 157; 166 Commons Journals 388; 204 Commons Journals 323; see also Speaker’s ruling 203 HC Official Report (5<sup>th</sup> series), 1 March 1927, col. 218. On 19<sup>th</sup> November 1987 the Queen gave consent to the Felixstowe Dock and Railway Bill had been properly obtained but not notified to the House of Commons was allowed to proceed.

<sup>23</sup> See Office of Parliamentary Counsel – “Queen’s or Prince’s Consent” para.132

<sup>24</sup> HC Reply by Sir George Young, Leader of the House 14<sup>th</sup> November 2011 col 498W



Queen, the relationship of the Duke of Cornwall with Ministers is not circumscribed by convention.

The consent of the Queen and the Prince of Wales is signified in Parliament by a Privy Counsellor usually at the Second Reading of a Bill.

The precise wording is:

“I have it in command from Her Majesty the Queen and His Royal Highness the Prince of Wales to acquaint the House that they, having been informed of the purport of the XXXXXX Bill, have consented to place their prerogative, so far as they are affected by the Bill, at the disposal of Parliament for the purposes of the Bill.”<sup>25</sup>

Clearly for the consent of the Prince of Wales, in right of the Duchy of Cornwall, to be obtained he must first be told the purpose of the Bill and how it would affect the Duchy of Cornwall. This is done by sending two copies of the Draft Bill to the Private Secretary to the Prince of Wales.

*For a detailed examination by the Office of the Parliamentary Counsel of the procedures for obtaining consent consideration should be given to the pamphlet contained in Appendix L entitled “Queen’s or Prince’s Consent” which was obtained after a Freedom of Information request.*

The earliest mention of Prince Charles giving consent was on 14<sup>th</sup> April 1970 in relation to “The Bolton Corporation Bill” and “The Plymouth and South West Devon Water Bill”<sup>26</sup>.

Amongst the more surprising Bills which have required the consent of the Duchy have been the “Repayment of Advances of Remuneration Paid to Deceased Employees Bill”<sup>27</sup>, the “Foreign Limitations Periods Bill”<sup>28</sup> and the “Taxation Provisions Relating to Nuclear Transfer Schemes Bill”<sup>29</sup>.

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<sup>25</sup> See for one of many examples, HL14<sup>th</sup> March 2006 column 1206

<sup>26</sup> See e mail from Parliamentary Archives to writer 21 April 2011

<sup>27</sup> HC 10<sup>th</sup> May 1976 vol. 911 cc 189-191

<sup>28</sup> HL 24<sup>th</sup> January 1984 vol. 447 cc 143

<sup>29</sup> HC 13<sup>th</sup> July 2004 vol. 423 cc 1365-1379

The Prince of Wales, in right of the Duchy of Cornwall, has been consulted, as advised by the Government Departments concerned and after an online search of Hansard, on the following Bills for the period 2005 - 2012:

Session 2004 – 2005

Companies (Audit, Investigations and Communities Enterprise) Bill

Finance Bill

Gambling Bill

Hunting Bill

Road Safety Bill

Session 2005 – 2006

Charities Bill

Commons Bill

Company Law Reform Bill

Natural Environment and Rural Communities Bill

London Olympics Bill

Session 2007 – 2008

Housing and Regeneration Bill

Energy Bill

Planning Bill

Retail Development Bill

Session 2008 – 2009

Apprenticeship Skills Children and Learning Bill

Children's Rights Bill

Coroners and Justice

Co-operative and Community Benefit Societies and Credit Unions Bill

Local Democracy, Economic Development and Construction Bill

Marine and Coastal Access Bill

Marine Navigation Aids Bill

Session 2010-2012

Crown Benefices (Parish Representatives) Measure Bill

Energy Bill

Localism Bill

Sovereign Grant Bill

Wreck Removal Convention<sup>30</sup>

Establishing the above list of those Bills which have required the consent of the Duke of Cornwall has been much more difficult than was expected. There is no confidence the list is definitive.

*D The right to be consulted*

It is difficult to identify what aspect of the “hereditary revenues, personal property or other interests” of the Duchy is affected by some of the Bills about which the Prince of Wales was consulted. It is not apparent why the Prince was consulted on the Children’s Rights Bill to take but one example. Examples, given in Erskine May’s Parliamentary Practice are as follows<sup>31</sup>:

Restrictions on the use that might be made of premises used by the Duchy;  
Creation of further statutory nuisances arising from land which have exposed the Duchy to legal proceedings;  
Changes to rules on *bona vacantia* and intestacy;  
Repeal of a protective provision which may have an adverse effect; and  
Application of legislation about construction contracts to contracts entered into on behalf of the Duke of Cornwall.

The provisions of the Freedom of Information Act 2000 were utilised in order to understand the process by which the Prince of Wales is consulted: letters were written to various Departments of State with the following outcomes. In considering the responses received it should be borne in mind the Courts have now decided: “...it will generally be

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<sup>30</sup> Letter from Office of Parliamentary Counsel to writer 12 August 2010, e mail from House of Commons Archives 4<sup>th</sup> May 2011 and e mail from House of Commons 18<sup>th</sup> April 2012 to Christopher Hastings.

<sup>31</sup> Jack, Sir Malcolm, (Ed.) op. cit. pp 663 - 664

in the overall public interest for there to be transparency as to how and when Prince Charles seeks to influence government.”<sup>32</sup>

#### Department of Transport - Marine Navigation Aids Bill

Copy correspondence between the Department and the Duchy was requested. The request was declined under Freedom of Information Act 2000 section 37(1)(a) which deals with communications with the Royal Household. It was explained that it was important the heir to the throne could correspond freely and frankly with Government<sup>33</sup>. A review of the decision was requested. It was pointed out the Duchy is described as a private estate and the Prince as a subject of the Crown. The Department advised they saw no reason to change their original decision. They went on to say:

“As a matter of constitutional law, *there is no distinction between the official and private capacity of The Queen and The Prince of Wales* (emphasis added) and in any event the exemption in section 37(1)(a) is capable of covering all communications with the Prince of Wales.”<sup>34</sup>

A complaint was made to the Information Commissioner who ordered the Ministry to “Disclose the requested information to the complainant.”<sup>35</sup> The Information Commissioner explained:

“The Commissioner considers that the public interest in disclosure lies in knowing more about how the Prince of Wales in his capacity as Duke of Cornwall influences government policy and the process by which his consent is obtained when Parliamentary Bills may affect the interests of the Duchy.”

“Essentially he (the Prince of Wales) is being consulted in his role as a landowner rather than as the Heir to the Throne.”

The correspondence between the Ministry and the Duchy has now been produced and is contained in Appendix L.

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<sup>32</sup> *Evans v Information Commissioner and Others* (2012) (UKUT 313 (AAC))

<sup>33</sup> Letter Dept. of Transport to writer 13<sup>th</sup> January 2011

<sup>34</sup> Letter Department of Transport to writer 14 March 2011

<sup>35</sup> ICO Decision Notice FS50381429 (See Appendix J)

### Ministry of Justice - Coroners and Justice Bill

An application similar to that sent to the Department of Transport was made and again denied because the request fell under the following exemptions under the Freedom of Information Act 2000:

Section 40(2) which exempts personal information from disclosure if to disclose it would contravene data protection principles in this case that “personal data must be processed fairly and lawfully”.

Section 41(1) which exempts information whose disclosure would constitute an actionable breach of confidence which overrides the public interest in disclosure.

Section 37(1)(a) Communications with the Royal Family and Royal Household. It was pointed out there is an important distinction between “What the public are interested in and what is in “the public interest””.

The Ministry wrote the “political neutrality of the Sovereign could not be preserved” in the absence of confidentiality<sup>36</sup>.

### Department of Environment Food and Rural Affairs (defra) - Marine and Coastal Access Bill

Again similar letter to those referred to above was sent. This time the submission was dealt with under the Environmental Information Regulations 2004 (EIRs). Again the request was refused<sup>37</sup>. The reasons given were:

Under 12(5)(f) of the EIRs disclosure:

“..would adversely affect The Prince of Wales’ privacy and could also have a chilling effect on the way in which he or his representatives correspond with Government Minister, thus impinging the constitutional convention that he is able to correspond with Government Minister in confidence.”

Regulation 12(3) and 13(2)(a)(i) which exempts the disclosure of personal data.

A general observation it was explained:

“..there is a well established constitutional Convention that correspondence between the Heir to the Throne/his representatives and Government is

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<sup>36</sup> Letter from Ministry of Justice to writer 14<sup>th</sup> September 2010

<sup>37</sup> Letter from defra to writer 7<sup>th</sup> December 2010

confidential in nature. The rights and duties that The Prince of Wales exercises depend on the confidentiality and privacy of communications between his office and Government.”

A review of the refusal by Defra was requested but the Department declined to change their decision.

A complaint was made to the Information Commissioner who ordered:

“Defra shall disclose to the complainant the information withheld under regulation 12(5)(f) and 13(1).”<sup>38</sup>

The Commissioner explained in his reasoning:

“Making legislation is perhaps the most important function of government....”

“...the public interest lies in knowing more about how the Prince of Wales in his capacity as Duke of Cornwall may influence government policy and the process by which his consent is obtained when Parliamentary bills may affect the interests of the Duchy of Cornwall. The Monarchy has a central role in the British constitution and in the Commissioner’s view the public is entitled to know how the various mechanisms of the constitution work in practice.”

“..the consent of the Prince of Wales is sought and ultimately given in cases where a bill would affect the interests of the Duchy; *there is no actual legal obligation to give consent.....*” (emphasis added)

The correspondence has now been produced by the Department and is reproduced in Appendix K.

Department of Communities and Local Government - Local Democracy Economic Development and Construction Bill

This time, after a request was made, copies of the letters sent to the Queen and the Duchy were provided. Her Majesty and the Duchy gave their “consent to the provisions in this Bill.”<sup>39</sup> Copies of the correspondence is produced in Appendix K.

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<sup>38</sup> ICO Decision Notice FER0380352 (See Appendix J)

<sup>39</sup> Letter Department Communities and Local Government to writer 29<sup>th</sup> November 2010

Department for Business Innovation & Skills (BIS)- Apprenticeship, Skills, Children and Learning Bill

The application made was refused for the same reasons as those given by the Ministry of Justice. A request for a review did not result in a change of the decision. It was explained:

“As you say the Duchy of Cornwall is a private estate. However, the Department is *required* (emphasis added) to consult with members of the Royal Family and Royal Household.”<sup>40</sup>

A Complaint was sent to the Information Commissioner whose immediate result was the disclosure of a number of e-mails which provided some understanding of the process by which the consultation with the Royal Household, including the Duchy of Cornwall is conducted. These suggest that changes were made to the Bill to accommodate the Royal Household and Duchy. The Royal Household and Duchy were also given the option about whether the proposed legislation should extend to them<sup>41</sup>.

In a full consideration of the complaint the Information Commissioner ordered:

“Disclose some of the requested information to the complainant.”

The reasoning for the decision was similar to that already outlined in relation to the other complaints to the Commissioner. The Department decided to Appeal the decision of the ICO. A compromise was agreed and copies of the relevant material is set out in the Appendix K.

*E The criteria for consultation*

Consultation with the Duchy of Cornwall and the consent of the Duke is not required for all proposed legislation. The next question is what factors are used to decide if the Duchy needs to be consulted? To determine this letters were sent to various Departments asking for details of the specific criteria by which it is decided that the Duchy should be approached. In the replies received reference was made to the Cabinet Office Guidelines. BIS advised that: “There is no bespoke BIS process or criteria in arriving at such determination”<sup>42</sup>.

The Department for Education stated:

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<sup>40</sup> Letter BIS to writer 13<sup>th</sup> April 2011

<sup>41</sup> Letter BIS to writer 26 July 2011 and 24 August 2011

<sup>42</sup> Letter from BIS to writer dated 24<sup>th</sup> August 2011

“When we consider what constitutes the “hereditary revenue, personal property or other interests” of the Duchy....we consider the text of the proposed legislation and apply to usual dictionary meaning of the words....Where it remains unclear whether or not consent will be required legal advice is sought...”<sup>43</sup>

A letter to the Cabinet Office resulted in the following:

“The Office does also have internal guidance that falls within the terms of your request. This information is however being withheld as falling with section 42 of that Act (legal professional privilege)...

The importance of this public interest was reaffirmed by the House of Lords in *Three Rivers DC v Bank of England* (No. 6) (2004) UKHL 48.”<sup>44</sup>

A request for an internal review was made and a reply was received on 16<sup>th</sup> November 2011<sup>45</sup> which, in summary, said the initial refusal had been considered and the original decision stood. The Duke and Duchy are, by Parliamentary usage entitled to be consulted when a Bill affects the “hereditary revenues, personal property or other interests” of the Duke of Cornwall. The Cabinet Office initially maintained we were not permitted to know how those terms are applied in practice such that the requirement for consent is triggered. In particular since it is only as Duke of Cornwall the heir to the throne claims particular constitutional privileges in other regards, at least theoretically, he a private citizen like all others, it is difficult to understand what “personal property or other interests” possessed by the Prince of Wales would require his consent.

A complaint was made to the Information Commissioner who ordered that the information should be released<sup>46</sup>.

## *F Conclusion*

The obtaining of the consent of the Prince of Wales, as Duke of Cornwall, described as “merely a usage of Parliament”<sup>47</sup> and “not a legal requirement”, began more than one hundred and sixty years ago and possibly before that. The first record we have dates from

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<sup>43</sup> Letter Dept. of Education to writer dated 22 September 2011

<sup>44</sup> Letter Office of Parliamentary Counsel dated 19<sup>th</sup> September 2011

<sup>45</sup> Letter to writer from Head of Knowledge and Information Cabinet Office dated 16<sup>th</sup> November 2011

<sup>46</sup> ICO Decision Notice FS50425063 (Appendix J)

<sup>47</sup> TNA LO 3/467 - Duchy of Cornwall Land Tax and Valuation (1913)



1848. It is not unreasonable to suggest the process might actually have begun at that time since it corresponds with Prince Albert being in charge of the Duchy. It is the sort of change for which he would have canvassed. It serves as means to ensure that Duchy interests, particularly financial interests could be safeguarded. However, it would appear that the consultation and consent are now a “requirement” according to BIS. If that is the case it is not clear how that obligation arose, what would happen if it were violated and who and by what means it would be enforced.

When writing to the Departments of State it was made clear that the enquiry was about the Duke and Duchy of Cornwall. It is only as Duke of Cornwall that by Parliamentary usage does the Prince of Wales have the right to be consulted. It is clear from the replies received that this distinction is not understood by the various Ministries.

The process is opaque as demonstrated by the responses to the enquires made. It should be pointed out under the Constitutional Reform and Governance Act 2010 Schedule 7 the Freedom of Information Act 2000 has been amended. There is now an absolute exemption in connection with communications with the Heir to the Throne and the second-in-line to the Throne, i.e. there is no public interest test. The requests made followed by the complaints to the Information Commission would now be rejected. The rules with regard to the Environmental Information Regulations 2004 have not changed.

This “private estate” is consulted on proposed legislation. The criteria explaining what those terms mean in practice is withheld. It is not obvious when the Duchy will be consulted. Furthermore the public will not in the future be permitted to see any papers which explain how the process works. One reason which was given for refusal is that it would involve a breach of the rule regarding the fair and lawful processing of personal data. What personal data of the Prince of Wales would have been at issue in the consultation with the Ministry of Justice over the Coroners and Justice Bill is difficult to imagine.

More significantly, it was claimed, the revealing of documents would breach the “constitutional convention that correspondence between the Heir to the Throne and Government is confidential”. It would have a “chilling effect” on the way the Prince of Wales corresponds with Government and would affect his privacy. How such an effect

would arise from an individual writing as a landowner is not clear. The assertion that “there is no distinction between the official and private capacity of the Queen and the Prince of Wales” is astonishing. There is a distinction between the “official and private capacity of The Queen and The Prince of Wales”. The Queen is Sovereign and Head of State the Prince of Wales is a subject, albeit one of high rank, of the Sovereign and a private citizen. The equating of the two is a constitutional development which is novel.

The exemption upon which all the Government Departments have relied is Freedom of Information Act 2000 section 37(1)(a) which deals with communications with the Royal Household. There is no definition of “Royal Household” within the Act. The Department of Transport advised that a distinction did not exist between the “Duchy and the Prince of Wales” and the term Royal Household should be taken to include the “representatives and advisers of The Queen and members of the Royal Family”<sup>48</sup>. This is a position which the Information Commissioner accepted.

It is possible to argue Prince Charles is doing no more than is the right of any concerned citizen when he comments on legislation. Leaving aside the fact his opinions are likely to carry more weight than other citizens it is as Duke of Cornwall he has rights greater than available to the rest of us. However, in exercising those rights he is not accountable.

There is inconsistency in the responses received: the Department for Communities and Local Government sent copies of the requested correspondence, BIS forwarded some but not all material; and other Departments refused to provide any information at all.

### *G The Duchy and Crown Immunity*

The topic of Crown Immunity is complex. In 1235 Bracton in his *Laws and Customs of England* wrote “*Quod Rex non debet esse sub homine’ sed sub Ded et Lege*”<sup>49/50</sup>. As early as 1561 in *Willion v Berkley* (1561)<sup>51</sup> it was settled in England that the Crown was bound by any statute that applied to it. It was also said in the same case: When The King gives His consent He does not mean to prejudice Himself” An early formulation of the principle in English Law dates from 1604:

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<sup>48</sup> Letter from Department of Transport to writer 14<sup>th</sup> March 2011

<sup>49</sup> That the King should not be under man, but under God and the law.

<sup>50</sup> Bracton, *Laws and Customs of England* (1235)

<sup>51</sup> *William v Berkley* (1561) (1 Plow. 223) (75 E.R. 339(KB))

*“Roy n’est lie per ascun statute, si il ne soit expressment nosme.”*<sup>52</sup>

Chitty describes it as:

“..the King is not bound by any Acts of Parliament as do not particularly and expressly mention him.

The King is impliedly bound by statutes passed for public good; the relief of the poor; the general advancement of learning, religion and justice; or to prevent fraud, injury or wrong.”<sup>53</sup>

Diplock L.J. stated that:

“the modern rule of construction of statutes is that the Crown...is not bound by a statute which imposes obligation or restraints on persons or in respect of property unless the statute says so expressly or by necessary implication.”<sup>54</sup>

In Halsbury’s Laws it is expressed as follows:

“The Crown is not bound by statute unless the contrary is expressly stated, or unless there is a necessary implication to be drawn from the provisions of the Act that the Crown was intended to be bound, or there can somehow be gathered from the terms of the relevant Act an intention to that effect...”<sup>55</sup>

*For an analysis conducted by the Office of Parliamentary Counsel see the pamphlet “Crown Application” contained in Appendix L. It is striking that the document makes no mention of either the Duchy of Cornwall or Duke of Cornwall.*

The basis of Crown Immunity is the maxim: “The King/Queen can do no wrong”. There are three possible understandings of the adage as follows. Whatever the King/Queen does cannot be wrong: The principle of “absolute perfection” which provides that, in law, the Sovereign is regarded as being incapable of thinking wrong or meaning to do an improper act. Next the Sovereign has no legal power to do wrong. Finally, as Maitland explained: “...against the King, the law has no coercive power”<sup>56</sup>.

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<sup>52</sup> *The King’s Case* (1604) (7 Co Rep 32a) “the King is not bound by any statute unless he is expressly named in it”

<sup>53</sup> Chitty, J., *A Treatise on the Law of the Prerogatives of the Crown* (1820) p 382

<sup>54</sup> *BBC v Johns* (1965) Ch. At 78-79

<sup>55</sup> Halsbury’s Laws of England Volume 8(2) Constitutional Law and Human Rights para.384

<sup>56</sup> Tomkins, A., “Crown Privileges” in Sunkin, M., and Payne, S., *The Nature of the Crown* (1999) p. 176

While there are those who may debate the basis of the principle of Crown Immunity and its extent, there is no doubt that it exists. It is questionable whether it can still be justified. It made sense when we had a “monarchical government” but that is no longer the case. A similar immunity is said to extend to the Duchy of Cornwall and it is this which will now be explored. This is not a theoretical question. Because of Crown Immunity the Duchy does not pay Capital Gains Tax, and, in respect of Duchy income, Prince Charles is not liable to income tax although he does make a voluntary payment equivalent to the amount that would be otherwise payable. As a further example there is a group on the Isles of Scilly called the Garrison Leasehold Group who are campaigning because the Leasehold Reform Act 1967, the Leasehold Reform, Housing and Urban Development Act 1993 and the Commonhold and Leasehold Reform Act 2002<sup>57</sup> do not apply to tenancies of the Duchy of Cornwall. Despite the fact they were not bound by the legislation, the Duchy agreed to enfranchisement of leases with certain exemptions one of which applied to the Isles of Scilly. The Duchy was concerned properties would be owned by “off islanders” and become second homes, to the detriment of the islands<sup>58</sup>. The concern may be legitimate but the fact still remains that a right available to all other lessees is not available to Duchy tenants because of the application of Crown Immunity.

It is difficult to establish when Crown Immunity began to be applied to the Duchy. There is no mention of it in the sixteenth century book by Sir William Staunford’s “The Pleas of the Crown”<sup>59</sup> or Sir Matthew Hale’s “The Prerogatives of the Crown”<sup>60</sup> published in the seventeenth century or specifically in Chitty’s “Treatise on the Law of the Prerogatives of the Crown”<sup>61</sup> issued in 1822. Although the latter did say:

“So a grant from the King to the Prince (of Wales) does not make alienation from the Crown, for the land continues parcel of the Crown.”<sup>62</sup>

We have also seen the observation made by Lord Redesdale in 1817 that

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<sup>57</sup> HC 3 April 2001 col. 176W

<sup>58</sup> Letter Farrer & Co, solicitor to Duchy of Cornwall, dated 5 April 2001

<sup>59</sup> Staunford, Sir William *The Pleas of the Crown* (1560)

<sup>60</sup> Hale, Sir Matthew, *The Prerogatives of the King* (1976 Written 1640-1676)

<sup>61</sup> Chitty, op. cit.

<sup>62</sup> Chitty, op. cit. p 405 He shows as authority for the proposition *Comyns Digest Roy G* which in turn cites *Palmer Reports*.

“..it will be difficult to find that the Prince of Wales as Duke of Cornwall stands in any other relation than that of a Subject considering him merely as Duke of Cornwall.”<sup>63</sup>

The Duchy in the nineteenth century sought to re-establish its right to wreck which brought it into dispute with the Board of Trade and holders of various manorial rights. In particular the Duchy claimed the Merchant Shipping Act 1854 did apply to Cornwall and the Board of Trade’s investigation into wrecks within the County was illegal. The matter was referred to the Law Officers who determined the Act did apply to the Duchy thus they did not enjoy the right to Crown Immunity<sup>64</sup>.

The issue which arose in 1855, when the Duchy was managed by the Crown, with regard to the payment of the Queen’s Remembrancer fees has been explained. It was concluded that the Prince of Wales was a subject suing for his own benefit and not suing “on the part of the Crown or the Public” and was in the same position as any other suitor “not the Crown or a Public Department of Revenue”. Therefore the provisions of the Exchequer Court Act 1842 did apply and the Duchy did not enjoy Crown Immunity. In that case the Attorney and Solicitor General stated:

“It therefore appears to us *incorrect to say that the interest of the Crown in these Revenues is permanent subject to the contingent claim of a HRH whenever a Prince of Wales exists....it is the interest of the Crown which is contingent..*”  
(emphasis added)

The Law Officers are saying it is the Duke of Cornwall to whom the Duchy reverts with the Crown having a contingent interest rather than the reverse.

Notes on the Civil List were prepared for the Treasury in 1897 they record “exemption from taxation is part of the Royal prerogative.”<sup>65</sup> They go on to say:

“The taxation paid in respect of the Duchies of Lancaster and Cornwall is shown in the annual accounts of these Duchies, and consists of property tax (for which certain sums are allowed annually to the tenants of the Duchies) land tax and “other taxes”.”

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<sup>63</sup> TNA TS 27/818 - Treasure Trove; Duchy claim mining rights (1907 – 1932)

<sup>64</sup> TNA BT 243/262 – The Duchy of Cornwall: Legislation relating to right of wrecks of the sea (1856-1985). For full discussion see Pearce, C., *Cornish Wrecking 1700- 1860* The Boydell Press (2010) p 182

<sup>65</sup> TNA T 38/837 – Civil List Notes “The Welby Papers” (1897)

There is no reference, which might be expected, in what is a comprehensive review, to Crown Immunity applying to the Duchy of Cornwall.

In 1899 Sir Edward Walter Hamilton of the Treasury wrote a letter concerning property rating of members of the Royal family in which he said:

“..it is a well known maxim that the Crown is not bound by any Act of Parliament except by express enactment, *there is no such maxim applicable to the Heir Apparent, or any other member of the Royal Family. I doubt, therefore whether the Executive Government could exempt expressly the Prince from any part of the Income Tax now paid by him without the authority of Parliament.*”<sup>66</sup> (emphasis added)

The only detailed analysis of this topic, as far as can be established, was conducted by the Solicitor for the Board of the Inland Revenue in 1913. The specific question was whether a provision of the Finance Act 1910 applied to the Duchy. The general point was whether:

“..the Prince of Wales possesses the same prerogatives as the King (who) is not bound by statute unless expressly named, the Prince of Wales either absolutely or at all events so far as the lands of the Duchy of Cornwall are concerned, is not bound..”<sup>67</sup>

In summary the line of reasoning advanced by the Board was: Crown Immunity was a prerogative right different in substance from other rights, for example royal fish, wreck and so on, granted to the Duchy. The King under the Bill of Rights 1688 had no power by prerogative to suspend laws as they applied to the Prince of Wales and if such a grant existed it would be “inoperative”. The Inland Revenue could find no authority “directly laying down the proposition that the Duke of Cornwall..is not bound by statute unless expressly named..”

The Duchy argued that:

- 1 The prerogative rights of the Duchy are identical with those of the Crown;

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<sup>66</sup> TNA T 168/71 - Papers relating to taxation and property rating of members of the Royal Family (1899-1904)

<sup>67</sup> TNA LO 3/467 - Duchy of Cornwall Land Tax and Valuation (1913)

- 2 Express mention is made of the Duchy in Acts of Parliament when those Acts are intended to apply to the Duchy;
- 3 Duchy lands are treated in the same way as Crown lands; and
- 4 The fact that Duchy lands are Crown lands mean the same principles apply.

The Board conceded that the procedure of signifying consent in Parliament had been applied to Duchy lands in the same way as Crown lands but that was a matter of Parliamentary usage - a view shared latterly by the Information Commissioner. There were no instructions to that effect and the position “might, and probably would, vary according to circumstances.” They also acknowledged that it had been the practice to deal with Duchy lands expressly in Acts of Parliament but argued it would be going too far to say that without an express statutory reference, Acts would not bind the Duchy. In this regard they quoted *The Attorney General to the Prince of Wales v Mayor of Plymouth* (1754)<sup>68</sup> and *The Attorney General to the Prince of Wales v St Aubyn* (1811)<sup>69</sup>.

The Inland Revenue acknowledged that the strongest argument put forward by the Duchy was that Duchy lands were Crown lands and therefore the same prerogatives applied to both. In *St Aubyn* it was said:

“Duchy lands are part of them (Crown Lands) as a member of the Royal establishment.”

*Rowe v Brenton* (1828)<sup>70</sup> was quoted at length as follows:

“I am clearly of the opinion that the Duke of Cornwall is not to be considered as a private subject; when there is no Duke of Cornwall, the Duchy belongs to the Crown.....when there is a Duke in all these matters the interest of the Crown is equally concerned.”

“considering the very peculiar nature of the Duchy of Cornwall, whether the Duchy be vested in the Crown or in the Duke, the Crown has a peculiar interest in it at all times..”

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<sup>68</sup> *Attorney General to the Prince of Wales v Mayor of Plymouth* (1754) (Wight 134)

<sup>69</sup> *Attorney General to the Prince of Wales v St Aubyn* (1811) (Wight 167)

<sup>70</sup> *Rowe v Brenton* (1828) (8 B & C 737) p 1224

It was, therefore, conceded on behalf of the Inland Revenue that the Crown retains some special and peculiar interest and Duchy lands in the hands of the Prince are not precisely in the same position as lands in the hands of a subject. However, to admit a special interest of the Crown is different from acknowledging that the special prerogative of the Crown applied.

The problem caused by the situation which arises when there is no Duke and is managed by the Crown was explored. It was suggested by the Inland Revenue that during those times when there was no Duke or no Duke of full age Crown Immunity did apply to the Duchy.

The Law Officers gave their opinion that:

“We are of the opinion that the same principles which render the provisions of an Act of Parliament inapplicable to the Crown unless the Crown is expressly named apply also to the Prince of Wales in his capacity as Duke of Cornwall. This result arises from the peculiar title of the Prince of Wales to the Duchy of Cornwall.”

The Law Officers did not then go on to explain what, in their view, was the nature of this “peculiar title”. As Mr Wilson said during the Select Committee Hearing in 1971 – 72:

“..the judgement was very short and a little inscrutable because it referred to the peculiar or special nature of the Duchy of Cornwall, and did not go on to say what was peculiar or special...”<sup>71</sup>

## *H Conclusion*

While the Solicitor to the Board of the Inland Revenue acknowledged there are complicating issues his proposition is as follows. The prerogative of Crown Immunity is a special right differing from other prerogative rights which can and have been granted by the Crown. The granting of such a prerogative would require specific words. There are no documents by which the Crown granted such a prerogative. Furthermore even if such a document existed it would be ineffective because of the Bill of Rights 1688 which prevents the Crown by prerogative suspending the application of laws to the Prince of Wales. Because the Duchy oscillates between the Crown and Duchy the Law Officers concluded the Duchy did enjoy this special prerogative. It must be assumed the “peculiar

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<sup>71</sup> House of Commons *Report from Select Committee on the Civil List 1971-72*, HC29 p 669



title” to which the Law Officers referred arises from the fact the Duchy “reverts” to the Crown when there is no Duke. Certainly the Great Charter of 17<sup>th</sup> March 1337 says if there is no Duke:

“..the same Duchy with the Castles Boroughs Towns and all other things abovesaid *shall* revert to us to be retained in the hands of the Kingdom of England until there appear such Son...” (emphasis added)

Mr Iain Wright, M.P., Under Secretary of State in the Department of Communities, and Local Government explained it as follows:

“..even though it is managed as a private estate, the Duchy of Cornwall can only be held by the eldest son of the reigning monarch, and if there is no son, then it *reverts* to the Crown. I believe this is self-explanatory where the link to the Crown is concerned.”<sup>72</sup> (emphasis added)

Erskine May in its explanation of the need to obtain consent in respect of Bills before Parliament explains the need for consent because of the “reversion” of the Duchy when there is no Duke.

The principle would appear to be that anything which affects the Duchy, particularly to its detriment, for example, the imposition of tax, has a consequence for the Sovereign because the Crown enjoys the right of reversion.

There are difficulties with the basis of the Law Officers opinion, in so far as it can be discerned, and others who share their logic. The Solicitor to the Board of the Inland Revenue and the Law Officers would appear to have been unaware of the comments in the House of Lords and the disputes which arose in the nineteenth century. The question of Mines Royal, a disagreement which started in the nineteenth century and is still unresolved, has been explored at some length. The Duchy claimed Mines Royal; the Crown Estate has resisted the claim because it is a prerogative right which is so “high a character” and could only be passed, the Law Officers argued, by express words. It is not in doubt that the Crown could grant such a right but it has not done so and it could not pass by implication. The Law Officers agreed with the Crown in an opinion which the

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<sup>72</sup> Letter Iain Wright M.P. Under Secretary of State Dept. of Communities and Local Government to Andrew George M.P. 16<sup>th</sup> June 2009

Duchy did not and does not accept. Unquestionably the right to Mines Royal, while a significant prerogative right, is a lesser right to that of Crown Immunity yet in the case of Mines Royal it did not pass while Crown Immunity does.

Next there is the question of the “reversion” to the Crown. It is important to emphasise that the Duchy does not “escheat” to the Crown. It is never absorbed in the Crown. Sir George Harrison in 1837 wrote that the King was “duty bound to maintain the Duchies and transmit them to his successors”. He suggested the Sovereign, when there was no Duke or the Duke was a minor was invested with the character of a trustee and “The Sovereign trustee could in fact if not in theory could do wrong if he bargained away the Duchy of Cornwall.”<sup>73</sup> The Duchy itself refers to the “trust” provisions of the founding Charters<sup>74</sup>. The Attorney General to H.R.H. the Prince of Wales likened the Duchy to a trust created under the Settled Land Act 1925<sup>75</sup>.

If we pursue the analogy of the Duchy being like a trust, the trustee then is either the Sovereign or the Duke of Cornwall. The beneficial interests are the life tenant, the Duke of Cornwall, with the Sovereign having a contingent interest. When the Sovereign is trustee then, as Harrison implied, he or she holds the Duchy as legal owner but not as absolute owner. That is to say he or she holds the property in accordance with the founding documents for the benefit of the beneficiaries from time to time. Whether it is the Sovereign or the Duke who is entitled to the income from the Duchy, they at all times have an “interest” in the estate and not in the estate itself which is a separate entity. To import the rights and privileges which a person enjoys personally, even the Sovereign, or by virtue of his or her position to his or her role as trustee is a dubious proposition. This logic would suggest that as the Sovereign has the right to Mines Royal, when the Sovereign is trustee then the Duchy would also enjoy Mines Royal which the Law Officers say it does not.

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<sup>73</sup> Harrison, Sir George, *Memoir respecting the Hereditary Revenues of the Crown and the Revenues of the Duchies of Cornwall and Lancaster* (1837) p 36

<sup>74</sup> Duchy of Cornwall Annual Accounts 31<sup>st</sup> March 2012

<sup>75</sup> *Michael Bruton v Information Commissioner, The Duchy of Cornwall and The Attorney General to HRH the Prince of Wales* (2011) (EA/2010/0182) p 17.

As a further demonstration of the restricted nature of the Monarch's interest in the land held by the Duchy it continues to be held in fee. In *The Attorney General v The Mayor and Commonalty of the Borough of Plymouth* (1754) Chief Baron Parker said

“It is clear, that the Crown does *not take an absolute fee, but only a qualified fee* till the birth of the King's eldest son he takes a fee; but it is only a qualified fee till he comes to the Crown, or till his own death..”<sup>76</sup> (emphasis added)

When there is no Duke of Cornwall the Crown holds the lands of the Duchy of Cornwall in qualified fee from itself.

In 1833 when the Duchy had reverted to the Crown a dispute arose regarding the Isles of Scilly in which it was concluded the title rested with the Duchy. In 1854, when the Duke of Cornwall was a minor and the Duchy was managed by the Crown a disagreement arose regarding the Queens Remembrancer's fees. If the Duchy had become absorbed in the Crown when there was no Duke or the Duke was a minor then these disputes could not have arisen. The Sovereign would have either disputed with himself or Crown Immunity would have applied.

Another example is the matter of *Bona Vacantia*. Even when there is no Duke or the Duke is a minor the right to *Bona Vacantia* continues to be dealt with separately by the Treasury Solicitor on behalf of the Crown and the solicitors to the Duchy of Cornwall on behalf of the Duchy. The Crown and the Duchy were and are distinct. A telling observation was made by the Clerk to the Crown in 1889 during the discussions about the production of a Royal Warrant for the Lord Warden of the Stannaries to be able to summon a militia was that the warrant could not suggest the Crown confirmed the appointment of the Lord Warden that would be a “proceeding which would be “*ultra vires*” (beyond the powers of) and “an encroachment on the jurisdiction of the Duke of Cornwall”<sup>77</sup>.

Halsbury's Laws of England summarises the situation. It says:

“Because the monarch is a separate person from....the Duke of Cornwall there can be a valid lease or conveyance between them...When the Duchy of Cornwall

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<sup>76</sup> *Attorney General to HRH the Prince of Wales, Duke of Cornwall v The Mayor and Commonalty of Plymouth and others* (1754) (Wight 134) p 1214

<sup>77</sup> TNA C 197/18 - Commission for the management of the Duchy of Cornwall (1827 -1889)

is vested in the Crown rights formerly enjoyed over one estate for the benefit of the other will not merge.”<sup>78/79</sup>

There is only one reported case which directly addresses the question of Crown Immunity and the Duchy of Cornwall, *Hobbs v Weeks* (1950)<sup>80</sup>. This was a County Court case, therefore, not a precedent, in which Judge Wethered at Wells County Court held:

“That when the lands of the Duchy of Cornwall are vested in the Crown (as they have been since the accession of Edward VIII) the Rent Restriction Acts do not apply to premises comprised in them.”

This decision would suggest that when not in the Crown the Rent Restriction Acts would then have applied.

There is no specific grant by the Sovereign of Crown Immunity to the Duchy of Cornwall anymore than there is an Act of Parliament extending Crown Immunity to the Duchy. The right is not mentioned by Staunford, Hale and there is a qualified reference, only, in Chitty all of whom are regarded as authorities in these matters. The evidence suggests that in the nineteenth century, as demonstrated by the Merchant Shipping Act 1854 and the Exchequer Court Act 1842, it was not assumed the Duchy enjoyed Crown Immunity. The opinion of the Law Officers in 1913 is inconsistent with the opinions offered with regard to Mines Royal and others and is based on a fundamental misunderstanding of the relationship of the Duchy to the Crown.

By virtue of the Duchy’s right to Crown Immunity a “private estate” enjoys substantial privileges without there being any clear basis upon which those privileges are founded. There is an opinion which is not consistent with the previous opinions offered by the same Department or past practice and which does not address the very detailed issues raised by the person who sought the opinion.

### *I The Duchy of Cornwall and Taxation*

The taxation of the Duchy of Cornwall cannot be considered in isolation from that of the Crown. The starting point is the Crown Private Estates Act 1800 which allowed the

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<sup>78</sup> *R v Inhabitants of Hermitage* (1692) (Carth. 239) (90 ER 743)

<sup>79</sup> Halsbury’s Laws of England Volume 12(1) section 213 Relations between aspects of the Crown.

<sup>80</sup> *Hobbs v Weeks* (1950) (100 L.J. 178) p 178

monarch to own property as a private person. It provided the Crown's private estates would:

“be subject and liable to all such taxes, rates, duties, assessments..as the same would have been subject and liable to, if the same had been property of any subject of this realm.”<sup>81</sup>

The provision was broadly repeated in the Crown Private Estates Act 1862<sup>82</sup>. The Crown is liable to Stamp Duty<sup>83</sup>.

The interpretation given to the provisions of the Crown Private Estate Acts by the Inland Revenue is that the Monarch is liable to tax on an estate, because it is said the Acts provides “..the private estates shall be subject” and the Acts only apply to taxes which are charged on land. Thus profits from farming, which is a trade and not an estate, are not liable to tax<sup>84</sup>. Many commentators are critical of this argument and consider it to be very generous<sup>85</sup>. However, be that as it may. The situation is:

“The Sovereign is not legally obliged to pay income tax, capital gains tax or inheritance tax because the relevant enactments do not apply to the Crown.”<sup>86</sup>

The relevant enactments do not apply to the Crown because the Crown enjoys Crown Immunity, that is to say the Crown is not generally bound by statute.

This is significant because in 1913, as we have already observed the Government Law Officers stated:

“WE ARE OF OPINION THAT the same principles which render the provisions of an Act of Parliament inapplicable to the Crown unless the Crown is expressly named, apply also to the Prince of Wales in his capacity as Duke of Cornwall.”<sup>87</sup>

The 1913 opinion was confirmed in 1921 when the Law Officers were asked once more.<sup>88</sup> The background to the 1913 opinion is that from at least 1849 the Duchy of

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<sup>81</sup> Crown Private Estates Act 1800 section 6

<sup>82</sup> Crown Private Estates Act 1862 sections 8 and 9

<sup>83</sup> Stamp Act 1891 section 119

<sup>84</sup> House of Commons – *Report from the Select Committee on the Civil List 1971-72* HC29 page 43

<sup>85</sup> See for example Bartlett, R.T., “Taxation and the Royal Family - I” (1983) *British Tax Review* p99 and “Taxation and the Royal Family – II” (1983) *British Tax Review* p138

<sup>86</sup> House of Commons - *Report of the Royal Trustees*, 1993 HC464 p 3

<sup>87</sup> TNA LO 3/467 - Duchy of Cornwall Land Tax and Valuation (1913)

<sup>88</sup> TNA IR 40/16549 - Law Officers Opinion Duchy of Cornwall (1921)

Cornwall had paid the income tax to which landlords were liable and other taxes<sup>89</sup>. The 1913 opinion was that the Duchy were no longer liable. Despite that, the Duchy continued to pay until 1921 when the burden was removed and a £20,000 voluntary contribution was made to the Exchequer<sup>90</sup>. The treatment of the Duke of Cornwall for income tax purposes does not correspond with the view of the Treasury in 1897 or 1899. Exemption was granted without the authority of Parliament which in 1899 was considered necessary<sup>91</sup>.

In 1969, after negotiations with the Prince of Wales, it was agreed he should surrender 50% of the net revenues of the Duchy. The memo to the Prime Minister stated: “The Household have reluctantly accepted this solution.”<sup>92</sup>

The present basis upon which the Duchy is taxed is set out in The Report of the Royal Trustees in 1993<sup>93</sup>. This confirmed the Duke of Cornwall enjoys the same Crown exemption applicable to the Monarch. From 6<sup>th</sup> April 1993 the Prince of Wales *voluntarily* began paying income tax on that part of the Duchy income used for personal expenditure. Mr. Ross (now Sir Walter Ross) Secretary of the Duchy explained “(The Prince of Wales) pays tax on a voluntary basis in exactly the same way as any other taxpayer”<sup>94</sup>. It was also agreed he would pay the market rent for the use of Highgrove. The Duchy is not liable to capital gains tax because: “The Prince of Wales is not entitled to its capital or capital gains”. The Queen or the Prince of Wales may, at any time, give notice of withdrawal from the arrangements. Whether that is politically feasible is another matter.

The Prince of Wales is fully taxable in all other respects. It is only in regard to the Duchy that special privileges are enjoyed.

Assuming, for the purposes of argument that the Duchy is entitled to Crown Immunity does that lead to the conclusion that it should not be liable to tax? There are a number of

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<sup>89</sup> TNA T 38/837 – Civil List Notes (1897)

<sup>90</sup> Tomkins, *op. cit* p 182

<sup>91</sup> TNA T 168/71 – Papers relating to taxation and property rating of members of the Royal Family (1899-1904)

<sup>92</sup> TNA PREM 13/2906 – Royal Family Proposal for dealing with revenues of Duchy of Cornwall (1969)

<sup>93</sup> House of Commons - *Report of the Royal Trustees* 1993 HC464

<sup>94</sup> House of Commons – Committee of Public Accounts 7 February 2005

arguments which suggest it does not. The reasoning is that imposing tax on the estate would reduce its value upon reversion to the Crown. The imposition of tax on the income arising from the Duchy would not affect the reversion to the Crown since that would not have any impact on the capital value of the Duchy.

There is a logic that the imposition of capital taxes would impact on the reversion to the Crown. However, the Crown has a “beneficial interest” in the Duchy which must be distinguished from the estate itself which is a distinct entity. Looked at that way it could well be argued that the effect which the taxation of capital of the Duchy estate has upon its value is irrelevant.<sup>95</sup>

The Law Officers in 1913 went on to say:

“Taxation is not and cannot be exacted from land; it is exacted from subjects who are taxpayers.”

Another way of expressing the proposition is “there can be no liability to tax without a taxpayer.”<sup>96</sup> Although the Duchy is likened to a trust there is no reference to “feoffees to uses (trustees)” in the Charter or in any of the Duchy Management Acts. The Officers of the Prince’s Council perform duties similar to trustees but they are not trustees. Therefore, the reasoning would appear to be since there are no trustees and no one who can be assessed for tax. Revenue law does not recognise the Duchy because it is not a natural person, a company or a trust although it has similarities with bodies the law does understand. If the comparison offered by the Duchy itself that it is like a trust under the Settled Land Act 1925 then that would suggest any assessment would be raised on the person who is entitled to the income.

Income tax is now paid, voluntarily, in the assessable income arising from the Duchy but capital gains tax is not paid. Between 2001 and 2008 the Duchy made £43 million in capital gains on which tax was not paid<sup>97</sup>. It claims, quite properly, that if it was liable to capital gains tax it would also be entitled to claim the reliefs and allowances available to

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<sup>95</sup> See Bartlett, op. cit p 99 and “Taxation and the Royal Family – II” (1983) *British Tax Review* p 138

<sup>96</sup> Bartlett, op. cit. p 143

<sup>97</sup> *Daily Telegraph* 16<sup>th</sup> August 2008 “Prince Charles makes £43 million profit from property deals”

other taxpayers. The fact remains the Duchy enjoys a considerable benefit not available to others<sup>98/99</sup>.

## *J Conclusion*

It is difficult to escape the conclusion that advice was sought from the Law Officers because the taxpayer concerned was the Prince of Wales and because all parties wished to avoid appeal proceedings. In any other case, in view of the doubts the Revenue must have had and continue to have, they would have raised assessments so the issue could, if the taxpayer chose, be determined through the normal appeal procedures particularly since the doubts raised about the Law Officers opinion and the interpretation given it has substance.

Those who make particular claims for the Duchy's relationship with Cornwall attach great importance to Crown Immunity. The above demonstrates that the right was only enjoyed by the Duchy from relatively recent times and as with so much else arose as a consequence of the Duchy seeking a financial advantage for itself.

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<sup>98</sup> HM Revenue and Customs were asked who provided the opinion with regard to the taxation of the sovereign and when. They were also asked if the opinion in respect of the Duchy of Cornwall had been reviewed if so by whom and when. They refused to answer. The ICO upheld the decision of HM Revenue and Customs see ICO FS50444734 Appendix J.

<sup>99</sup> The taxation of the Duchy is coming in for increasing public scrutiny see, for example, Wilcock, D., and Mann, Petra, "Prince Charles in tax dispute – Duchy denies "tax avoidance scam"" *Western Morning News* 17<sup>th</sup> December 2012. Booth, R., "Prince Charles' £700m estate accused of tax avoidance" *Guardian* 14<sup>th</sup> February 2013 and Booth, R., "MPs challenge tax exemptions for Prince Charles estate." *Guardian* 15<sup>th</sup> February 2013





## Chapter 10

### Conclusions

**“The elevation from earldom to dukedom, and the gift of it to his son, might appeal to Cornish pride and give the illusion they were being granted some semblance of autonomy from English rule.”<sup>1</sup>**

**“The Duke of Cornwall has no constitutional role.”<sup>2</sup>**

#### *A Introduction*

This Chapter summarises and offers conclusions to the issues which have been identified in the course of this work. A start will be made with a consideration of the consequences this thesis has for those claiming “Cornish Distinctiveness” and then move on to consider more general matters.

#### *B Cornish Distinctiveness*

On crossing the boundary into Cornwall you are greeted with the sign - “Welcome to Cornwall”. Underneath the English appears the Cornish: “KERNOW – a’gas dynergh”. The use of the Cornish language, which died out 200 hundred years ago and is now being revived, is but one sign of what a commentator has referred to as: “banal nationalism”<sup>3</sup>. Another symbol is the ubiquity of the black and white St. Piran’s flag which is found on car stickers and in advertising. It is used by local government and waved enthusiastically at events of all kinds. The Union flag is hardly seen<sup>4</sup>.

It is indisputable that many people living in or having an association with Cornwall have a sense that it is distinct, connected to but not part of England. As evidence of this difference, it is pointed out that, for example, there is a word for Cornish in every European language, apart from Finnish and Basque<sup>5</sup>. The attitude can be summarised by a slogan appearing on T Shirts which reads “Cornwall is next to England Just like Wales”

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<sup>1</sup> Burnett, D., *A Royal Duchy* (1996) p 17-18

<sup>2</sup> Witness Statement Sir Walter Ross *Kirkhope v Information Commissioner and National Archives* (2012) (EA/2011/0185)

<sup>3</sup> Billig, M., *Banal Nationalism* (1995) quoted in B Deacon *Cornwall – A Concise History* (2007) p 217

<sup>4</sup> Bruxelles, Simon de, “All quiet on the Southwestern front?” *The Times* 5<sup>th</sup> March 2012

<sup>5</sup> The French for Cornish is “Cornouaille” the Spanish is “Cornualles” for example.

or indeed a website devoted to Cornish matters entitled: “This is not England”<sup>6</sup>. In 2009 Dan Rogerson, M.P. introduced into the House of Commons a “Government of Cornwall Bill” which was never likely to become an Act but, nevertheless, generated debate and discussion. As further proof of this feeling, in December 2011 50,000 people signed a petition in favour of a Cornish Assembly which was delivered to Downing Street<sup>7</sup>.

Kernowcentrics argue, as we have seen, that Cornwall is not “in law” part of England. It is: “One of the Four Nations of Britain”<sup>8</sup> whose history and constitutional status has, until recently, been “suppressed”<sup>9</sup>. Dr. Loveday Jenkins’, who sits on Cornwall Council, explanation, which is one many would accept, is; “Constitutionally speaking Cornwall is a separate entity that has never been through an act of union with the English monarchy.”<sup>10</sup>

This thesis is not primarily concerned with claims made for and against the constitutional status of Cornwall. However, the Duchy and the contentions made for it are so closely associated with the arguments of the Kernowcentrics it would be wrong not to devote some space to the issues which arise.

### The Creation of the Post Conquest Earldom and Dukedom of Cornwall

The Conqueror had newly won territory to hold. He granted wide powers to trusted lieutenants to enable them to guard his frontiers. The areas included the Welsh border, East Anglia, Kent Sussex, Hampshire, the Isle of Wight and indeed Cornwall<sup>11</sup>. The creation of the Earldom of Cornwall, based on the pre-conquest Earldom of Cornwall, was not unusual. Nor was Cornwall unique in the powers granted by the Sovereign to the local Earl. Cornwall together with a number of other estates was granted to a half brother of William, Robert of Mortain to ensure it was secured. Similarly, for example, another half brother, Odo of Bayeux, was granted the Earldom of Kent.

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<sup>6</sup> [www.thisisnotengland.co.uk](http://www.thisisnotengland.co.uk)

<sup>7</sup> According to the 2011 Census 84,000 declared their nationality to be Cornish compared with 37,000 in 2001 (Western Morning News 12 December 2012)

<sup>8</sup> Murley, C., et al (Eds.) *Cornwall: One of the Four Nations of Britain – An introduction to the Link between Cornwall’s Past, Present and Future* (1996)

<sup>9</sup> [www.duchyofcornwall.eu/duchy05.php](http://www.duchyofcornwall.eu/duchy05.php) “Suppression of Cornish Identity”

<sup>10</sup> Bruxelles, op. cit.

<sup>11</sup> Barraclough, G., “The Earldom and County Palatine of Chester” (1951) *Transactions of the Historical Society of Lancashire and Cheshire Vol CIII* p 28

To say at this time Cornwall “resembled a palatinate”<sup>12</sup> is inaccurate. There is debate about when that term gained meaning but it was certainly not before the middle thirteenth century. In any event the Earls of Cornwall never enjoyed the powers of a “palatinate”. They had considerable authority for sure but it was not as extensive as that of the Earl of Chester, the Bishop of Durham or later the Duke of Lancaster. Under the ancient Earldom Cornwall may well have: “..been to a considerable extent independent, enjoying privileges in the shape of a measure of autonomy and freedom from direct interference by the central government...”<sup>13</sup> But if that was true of Cornwall it was even more true of Cheshire, the Welsh Marches and the Northern Counties who enjoyed even greater power.

The elevation of the Earldom into a Duchy is clearly significant. For Kernowcentrics it is recognition of the particular status of Cornwall. The fact that the Black Prince was already Earl of Chester and later became Prince of Wales hardly rates a mention. It is as if these titles were then, as they undoubtedly are now, merely honorific. That was not the case. The Earldom of Chester was a Palatine County. It did not pay taxes imposed by Westminster because it was not represented in Parliament until the sixteenth century. Writs were issued in the Earl’s name and heard before the Earls Courts. The Earl had the right of “life and limb”. Similarly with the Principality of Wales came considerable estates and responsibilities.

The Prince’s Council, established, significantly, in 1343 when the Black Prince was made Prince of Wales, was responsible for the government and administration which came with the Dukedom but also with the Earldom of Chester and the Principality of Wales. During the fifteenth century the Council, it will be recalled, was located in Ludlow which was a more convenient location for dealing with those estates of most concern to the heir to the throne being Cheshire, Flintshire and the Marcher Lords. While Cornwall was never made a Palatinate, the Palatine County of Lancaster, based on the precedent of the Palatinate of Chester, was established after the Dukedom of Cornwall. It also had its own Courts and writs issued in the name of the Duke of Lancaster and not the Sovereign.

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<sup>12</sup> Deacon, B., *Cornwall A Concise History* (2007) p23

<sup>13</sup> Pearce, R., *The Land Beside the Celtic Sea: Aspects of Cornwall’s Past* (1983) p 51

For only 8 years of the 338 years between 1376 and 1714 was the Duchy in the hands of a Duke of full age. The people who administered the Duchy and were responsible for the system of justice were individuals appointed by and answerable to the Crown.

There is an intimate relationship between the Duchy of Cornwall and Cornwall as will be summarised shortly. It is clear there are constitutional characteristics unique to Cornwall but to extrapolate from the creation of the post conquest Earldom of Cornwall and the establishment of the Dukedom that Cornwall is a dominion of the Crown of England but is not part of the state of England is not supported by the evidence.

### The Stannaries

There is a misunderstanding in Cornwall and elsewhere with regard to the Stannaries and their uniqueness. The Cornish Stannaries were a system concerned with the administration of a particular industry, initially tin mining. It comprised of Courts, a Convocation (or Parliament) and a taxation regime. Devon also had Stannaries organised on a similar basis. The lead miners of Derbyshire, for example, had many obligations and privileges comparable to those of the Cornish miners<sup>14</sup>.

The Convocation of the Tinnars of Cornwall has met only six times. Firstly in 1588, then 1624, 1636, 1688, 1714 and finally 1753. The last meeting of the Convocation of the Tinnars of Devon was in 1786. Those Convocations or Parliaments were interested in the better governance of the Tin Mining industry not with passing general laws for the whole community of Cornwall.

While Cornwall was not exceptional in having a system concerned with the administration of the mining of metallic ores, it did have features which differentiated it. The Stannaries of Cornwall applied to the whole County of Cornwall as opposed to Devon which had four Stannary Towns only, Chagford, Tavistock, Ashburton and Plympton whose precise boundaries were never defined. The Charter of Pardon of 1508 gave the Cornish Convocation the right to veto Westminster legislation which was never exercised but nevertheless is a right which the Great Court of the Devon Tinnars never enjoyed. As Professor Pennington said “No other institution has ever had such wide

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<sup>14</sup> Chynoweth, J., *Tudor Cornwall* (2002) p 27

powers in the history of this country.”<sup>15</sup> Cornish Stannary Law is still part of the law of England and Wales.

While the Stannary system within Cornwall does not make Cornwall unique there are characteristics which make it different from comparable regions.

#### The Duke of Cornwall’s consent to legislation

A great deal of importance is attached to this privilege. It is a matter of Parliamentary usage and it is not clear what if any consequences would flow if such consent was not sought when it should have been.

The need to get the Duke’s consent, according to John Angarrack is:

“...a reflection of parliament’s inability to freely legislate in respect of the Duchy of Cornwall....This remarkable situation stems not just from the formal elevation of Cornwall into a duchy in 1337/38 but also to a time much earlier.

Even a cursory examination will reveal that both the governance and legal identity of Cornwall lie within the jurisdiction of the Duchy of Cornwall...which remains extra-jurisdictional to the UK Parliament.”<sup>16</sup>

The difficulty with the above analysis is that the best research would indicate the procedure for obtaining the Duchy’s consent is not one which dates back to the creation of the Duchy. The earliest example which can be established is in 1848. It is not clear on whose initiative the practice began. It is a reasonable conjecture that since this was during the time Prince Albert was responsible for the Duchy, it commenced at his initiative and was a means of protecting the Duchy’s economic interests from potential Parliamentary encroachments.

#### The Duchy of Cornwall and Crown Immunity

This is an issue which has been examined in considerable detail. It is another of those “evidences” to which Kernowcentrics point which distinguishes the Duchy and Cornwall’s position within the Duchy.

Research suggests that until the end of the nineteenth century there was no suggestion that the Duchy or Duke of Cornwall enjoyed Crown Immunity. Quite the reverse in fact.

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<sup>15</sup> Pennington, Prof. R., *The Laws of the Stannaries of Cornwall* (1974) Introduction

<sup>16</sup> [www.duchyofcornwall.eu/latest/](http://www.duchyofcornwall.eu/latest/)

It was discovered in 1913 following an unsatisfactory Law Officers Opinion and was the means by which the Duchy and Duke were relieved of the obligation to pay tax. There is no evidence to suggest it was an “ancient right”. It was associated with the Duke and Duchy claiming an economic advantage.

#### The “Cornwall Foreshore Dispute”

A huge amount of significance is attached to this dispute and the claims made by the Duchy’s lawyers which were, apparently, accepted by the arbitrator Sir John Patteson. It was said:

the Duke was quasi sovereign within the Duchy;  
the Crown appears to have denuded itself of every remnant of seignory and territorial dominion; and  
the Charters are sufficient to vest in the Dukes of Cornwall not only the government of Cornwall but the entire territorial dominion and over the County.

There are examples of other statements which are in similar vein.

The Duchy attached great importance to the disagreement and, what they regarded as, its successful outcome, and referred to it constantly in other arguments including, for example, that which arose over Royal Mines and taxation in 1913.

In order for the issue to be fully understood the following should be borne in mind. Theoretically the two parties involved were the Duke of Cornwall and his mother the Queen. In fact at this time, 1855, Prince Albert was thirteen years old and the Duchy was managed by trustees appointed by the Queen. In practice the Duchy was controlled and administered by the Lord Warden of the Stannaries, the Queen’s husband, Prince Albert.

The dispute was concerned with “The Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall.” As a generality the foreshore and the Undersea-Minerals are a prerogative of the Crown and as such were surrendered by Queen Victoria when she ascended the throne. Thus, in practice, the dispute was not with the Sovereign but with the Office of Woods which was the predecessor of the Crown Estate. In summary the issue was, in effect, between Prince Albert, as Lord Warden of the Stannaries, and the Office of Woods and ultimately the Exchequer.

Since the Queen had surrendered the Hereditary Revenues of the Crown, including the right to the Foreshores, if the Duchy succeeded in demonstrating that in Cornwall the Foreshores and the Under-Sea Minerals were a prerogative right of the Duchy then the Royal Household would recoup some of what had been given up. Victoria's Civil List did not take account of any income from the Duchy of Cornwall. That is an increase in Duchy income did not result in a reduction in her Civil List. Therefore, it was in her economic interest that she lose the argument and her husband acting on behalf of her son win.

The claims made by the lawyers acting on behalf of the Duchy are striking and were, of course, challenged by the Government Law Officers. Sir John Patteson did not give a view on each of the claims or counter claims. He was not required to do so. The fact that the Duchy case was accepted does not mean that each claim made in support of their case was accurate. The fact that lawyers represent their client and advance arguments in support of their position should not come as a surprise. That is not to say the Duchy case was without foundation; it is to say the Duchy was involved in a "litigious" matter and were robust in the propositions they put forward. Their purpose was to secure an economic advantage for the Duchy and presented arguments to secure that objective.

The various disputes between the Crown and the Duchy have been considered in detail in previous pages, for example the seaward extent of the Duchy of Cornwall, the Queen's Remembrancer's Fees and the issue with regard to Royal Mines. In those cases the same arguments were advanced by the Duchy as in the "Cornwall Foreshore Dispute" and were not accepted. Furthermore, they were all concerned with the Duchy arguing to gain some financial advantage either by not paying fees that would otherwise be paid or claiming a prerogative right.

The claims made by the Duchy in the "Cornwall Foreshore Dispute" are striking but they must be seen against the background of the other debates which arose particularly during the 19<sup>th</sup> Century and their significance judged accordingly.

#### The Duchy is not Cornwall

The precise nature of the Duchy of Cornwall's interest in the land of Cornwall is full of ambiguities and remains unresolved. For Kernowcentrics the Duchy of Cornwall, in



simple terms, owns the land of Cornwall “allodially”. They claim the suggestion that; “..the Duchy of Cornwall is a private estate owning the whole of Cornwall on a fee simple basis..”<sup>17</sup> arises from the fact that to concede otherwise would be to acknowledge “...the Duchy of Cornwall...is a devolved, constitutionally distinct, part of government.”

This work has tried to examine the issue particularly with the assistance of the Land Registry and no satisfactory conclusion has been reached. The Statute of *Quia Emptores* 1290 prevents “sub-infeudation” or the creation of a freehold out of a freehold. Yet the usual analysis offered for the ownership of legal interests in Cornwall suggests that is what does happen. The Duchy of Cornwall, it is argued, has a fee simple in the whole of Cornwall and freehold properties in Cornwall are held of the Duchy.

The issue of the land of Cornwall and its ownership is one of those areas which does highlight one of the differences between Cornwall and the rest of England and, therefore, would tend support the claims of the Kernowcentrics.

#### Other Prerogative Rights

There are a number of prerogative rights relating to Cornwall enjoyed by the Duke of Cornwall which have been set out. These include:

- The right to Royal Fish;
- The right to Wreck;
- The right to Treasure Trove;
- The right to escheat and *Bona Vacantia*; and
- The right to choose the High Sheriff of Cornwall.

Within the Palatine County of Lancaster the Queen, as Duke of Lancaster has similar rights so in this regard Cornwall is not unique. But it clearly is unusual and again supports the argument that the relationship of the County with the Crown and the rest of England is different.

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<sup>17</sup> [www.duchyofcornwall.eu/latest/](http://www.duchyofcornwall.eu/latest/)

## *C Conclusion*

In 2011 70,000 Cornish schoolchildren were surveyed and 41 per cent indicated they saw themselves as “Cornish” rather than “English”<sup>18</sup>. This indicates there is a growing sense that Cornwall is different. Since children are the future presumably the feeling will grow. Some of that sentiment is based on the evidence arising from “legal arguments” which do not support the case. For example, the claims, which are based in inadequate research, about the consent of the Duchy to proposed legislation, Crown Immunity and the Stannaries. That is not to say there are not distinguishing features.

There are debates based on a broader analysis of the history of Cornwall and its relationship with the English state. Whether or not those who feel strongly will achieve their ambition of having “Cornish Distinctiveness” recognised in a “Cornish Assembly” will depend upon whether enough people agitate for the change. It will not be based on inaccurate assertions of the origins of various privileges which the Duchy and Duke of Cornwall have acquired.

## *D Other Issues Arising*

The survival of the Duchy of Cornwall and the fact it continues to play a significant part in the constitution of the English state is remarkable. It is after all over 670 years old. It is all the more surprising in light of the fact that so much about its status, its rights and privileges remain controversial or uncertain. For it to be allowed to continue can only mean it serves, what the state regards, as a valuable function.

### “A publicly accountable private estate”<sup>19</sup>

The evidence presented in this thesis suggests the Duchy is not “publicly accountable” or a “private estate”.

The requirement that accounts be presented to Parliament following Duchy of Lancaster and Cornwall (Accounts) Act 1838 is said to have made the Duchy of Cornwall “publicly accountable”. However, there is no evidence that there has ever been a debate following the presentation of the accounts. The Public Accounts Committee of the House of Commons investigation of 2005 into the Duchy of Cornwall (and Lancaster) was the first

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<sup>18</sup> Bruxelles, op. cit.

<sup>19</sup> Haslam, G., “Modernisation” in Gill, C (ed) *The Duchy of Cornwall* (1987) p 53

such specific Parliamentary enquiry in 670 years. The Treasury's approval is required before the Duchy can undertake certain transactions, however, according to Sir Walter Ross, Secretary of Keeper of the Rolls of the Duchy, agreement has never been withheld<sup>20</sup>.

The Duchy of Lancaster with reference to its Records and Charters says:

“Today, most of the great collection is housed in The National Archives at Kew near London. Working records are retained in the Duchy office in central London. Transfers of additional items to Kew are made periodically.”<sup>21</sup>

By contrast the records of the Duchy of Cornwall are not available publicly and the experience of researching this thesis has demonstrated getting agreement for them to be inspected is very difficult.

Because of its dubious claim to Crown Immunity, the Freedom of Information Act 2000 does not apply to the Duchy although; subject to the case being appealed<sup>22</sup> it is a “public authority” for the purposes of the Environmental Information Regulations 2004. Some limited success was achieved as part of the process of preparing this thesis in obtaining copies of correspondence between the Duchy and Government Departments. Because of the extended exemptions granted to the Royal Household in the Freedom of Information Act 2000 by the Constitutional Reform and Governance Act 2010 that option will not be available to future researchers. The Duchy provides information when obliged to do so and further details if it is expedient but that does not correspond with public accountability.

In regard to the Duchy being a “private estate” Sir Walter Ross, in evidence which was supported by Sir Michael Peat, at one time Principal Private Secretary to H.R.H. The Prince of Wales, said that because the Duchy was a “private estate” the income from the Duchy was for Prince Charles to spend as he liked. His choice to use part of it to fund his public duties was a matter entirely for him<sup>23</sup>. The fact that Duchy income has been used in part or wholly to support the Queen and the Heir to the Throne in his or her public

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<sup>20</sup> *Kirkhope v Information Commissioner and National Archive* (2012) (EA/2011/0185)

<sup>21</sup> [www.duchyoflancaster.co.uk/about-the-duchy/records](http://www.duchyoflancaster.co.uk/about-the-duchy/records)

<sup>22</sup> *Michael Bruton v The Information Commissioner and the Duchy of Cornwall* (2011) (EA2010/0182)

<sup>23</sup> Evidence *Kirkhope v Information Commissioner and National Archive* (2012) (EA/2011/0185)

duties since 1760, a principle now enshrined in the Sovereign Grant Act 2011, apparently makes no difference to the proposition the Duchy of Cornwall is a “private estate” whose income is wholly at the disposal of the Prince of Wales.

Similarly Sir Walter claimed the Duke of Cornwall has “no constitutional role”. Yet the Minister for the Natural Environment, Wildlife and Rural Affairs, for example, wrote to the Private Secretary to the Prince of Wales, Sir Michael Peat, on 5<sup>th</sup> November 2008 about what was then the Marine Bill and became the Marine and Coastal Access Act 2009. The letter drew attention to the parts of the Bill which: “..would require the Prince’s consent.” On 12<sup>th</sup> January 2009 Sir Michael replied: “I can confirm that the Prince of Wales is content with the Bill.”<sup>24</sup> One cannot imagine many more fundamental constitutional roles than being asked to give consent to legislation. There is no other head of a “private estate” who is asked, as a result of occupying that position, for such consent. The Duchy and the Duke of Cornwall enjoy Crown Immunity and as a consequence the Duchy does not pay Capital Gains Tax and the Duke pays an amount equivalent to income tax on a voluntary basis. It also means that the various Leasehold Reform Acts do not apply to the Duchy so that various tenants of the Duchy do not enjoy the same rights as tenants of other landowners. This privilege is unusual if not unique for a “private estate”.

Other examples of the atypical characteristics of this “private estate” have already been given, amongst them being the Duchy’s right to *bona vacantia* in Cornwall, the fact of it being the Harbour Authority for the Isles of Scilly; and the Duke choosing the High Sheriff of Cornwall.

Any other “private estate” which based a claim for exemption from tax with the Inland Revenue on the 1913 Law Officer’s Opinion would have had an assessment raised and the matter would have come before the Courts to be resolved. In this case it is convenient for the Duchy not to be treated like any other “private estate”.

The observation of Phillip Hall in connection with the Monarchy generally could be equally applied to the Duchy of Cornwall:

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<sup>24</sup> Letter 5<sup>th</sup> November 2008 and reply 12<sup>th</sup> January 2009 from Sir Michael Peat and Huw Irranca-Davies, M.P. Minister for the National Environment, Wildlife and Rural Affairs released under the Freedom of Information Act 2000

“This deft switching from the public to the private, from the Prerogative of the Crown to claiming the rights of the ordinary citizen, and back again, is characteristically employed as regards the financial affairs of the monarch.”<sup>25</sup>

The Duchy of Cornwall is not a private estate. It is part of the Hereditary Revenues of the Crown. Since at least 1780 when Edmund Burke raised the issue there have been suggestions that the Duchy should be surrendered, as it was during the time of William III and Queen Anne, with the rest of the Hereditary Revenues. The reason it has not is because of policy. It is not expedient that the Crown should be wholly reliant on income voted by Parliament. More significantly, if Sir Walter Ross was taken at his word and the Prince of Wales chose not to use Duchy income for his public functions, the Exchequer grant would have to be increased and the “Civil List” would be “an easier mark for criticism”<sup>26</sup>. The evidence clearly suggests that a significant reason for insisting the Duchy is a private estate is to obscure the true cost of the monarchy.

#### The Duchy and the Crown

The relationship of the Duchy to the Crown varies depending upon which generates the greatest economic advantage. So we have seen, as in the case of the Cornwall Foreshore Dispute, the Duchy claiming rights against the Crown. However, as with the Queen’s Remembrancer’s fees, the Duchy has asserted it is part of the Crown and should enjoy the privileges of the Crown. In that case not paying the fees an ordinary citizen would have had to pay.

A point made previously is worthy of repetition. For example, the Duchy neglected the right of wreck for many years. However, since in 1850 some small revenue “could be anticipated from this source”<sup>27</sup> it was decided to pursue the issue. The degree to which the Duchy secured income from the right of wreck within Cornwall meant that the Exchequer received less income. The Duchy would claw back for the Royal Household income otherwise surrendered.

It is claimed that the reason for a number of the privileges enjoyed by the Duchy of Cornwall is that it reverts to the Crown when there is no Duke. Anything which

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<sup>25</sup> Hall, P., *Royal Fortune* (1992) p 125

<sup>26</sup> TNA T 160/632 – Civil List in relation to the hereditary and temporary revenues of the Crown (1936)

<sup>27</sup> Report to her Majesty the Queen from the Council of H.R.H. The Prince of Wales (1862) p 15

diminishes the Duchy, for example the payment of Capital Gains Tax, would reduce the value of that reversion and for that reason the Duchy enjoys Crown Immunity and the right to give consent to legislation. This analysis is inaccurate or at best partial. The Duchy of Cornwall never “escheats” to the Crown. When there is no Duke of Cornwall being the eldest living son of the Sovereign being Heir to the Throne the Crown has a “qualified fee” until a Duke appears at which point the Duchy reverts to the Duke. The entitlement of the Crown is always a “contingent remainder.”<sup>28</sup> This was the decision of the Law Officers in connection with the Queen’s Remembrancer’s Fees. The Crown holds as “trustee” until a Duke appears.

If the argument is accepted that the reversion to the Crown should be protected it is difficult to understand why that meant the income from the Duchy would be free of income tax since that had no consequence for the reversion.

#### The avoidance of litigation

The Duchy and Government have and continue to avoid litigation despite the fact many contentious issues have arisen between them. They have been prepared to arbitrate or seek the views of the Government Law Officers. The consequence has been that some of the privileges of the Duchy, for example Crown Immunity, are based on Opinions which are either unsatisfactory or inconsistent. It is important to emphasise that Opinions have never been subject to judicial review: they are simply Opinions and not law.

In the cases in which Opinions have been given which correspond with the views of the Duchy, it is content to accept them. If, however, the Duchy takes a contrary judgment then it will be challenged over prolonged periods, as in the case of Royal Mines.

It also means the full extent of the rights and privileges of the Duchy have never been fully explored. So, for example, the Duchy’s right to the Isles of Scilly, as agreed by the Law Officers, is implicit arising from the rights of the Earls of Cornwall. While the right to Royal Mines, which the Duchy claims is similarly implicit, is denied by the Crown. The latter, in the issue which arose over the seaward extent of the Duchy and Royal

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<sup>28</sup> Rutherford, L., and Bone, S., *Osborn’s Concise Oxford Law Dictionary* (1993) “A contingent remainder - A remainder limited so as to depend on an event or condition which may never happen..” p 88

Mines, contended that the reversion of the Earldom of Cornwall to the Crown brought to an end the rights and privileges of the Earldom and were not inherited by the Duchy.

### *E Conclusion*

The Duchy of Cornwall is a substantial organisation enjoying privileges otherwise only available to the Crown. It is used to fund the public functions of the Head of State and the prospective Head of State. The Duke of Cornwall, as a consequence of his being asked to give consent to legislation, has a significant constitutional role. Despite the important role the Duke and Duchy occupy in the public life of the United Kingdom enquiry is discouraged.

The Duchy and Government persist in the claim the Duchy is a “private estate” despite the fact it is a term without meaning. The Duchy is only a “private estate” when it is not convenient for it to be part of the Crown.

There has been an avoidance of judicial examination of the Duchy’s claims with the result many of them are based on Opinions which are unsatisfactory or inconsistent. Those Opinions, which would not be accepted if presented by any other “private estate”, have been allowed by the authorities without challenge.

There is no question the Duchy is a unique institution and there are many ambiguities about its status. Those doubts are a barrier behind which it is convenient for the Duchy and Government to hide. If the usual explanations are challenged then procrastination and delay has been the experience of this researcher. Persistence results in the resources of the State being utilised which an ordinary citizen cannot hope to match. The Duchy of Cornwall is not a quaint hangover from a medieval past, charming but irrelevant; it is an anachronism, secretive and unaccountable. It benefits from the deference of public officials. It fulfils an important public function and as with other public bodies it should be open and accountable. A simple beginning would be for the Duchy of Cornwall to emulate the Duchy of Lancaster and transfer its records to the National Archive.

### *F Recent Controversies*

Since this thesis was completed the results of the various Freedom of Information requests made, in connection with the Duke of Cornwall’s right to give consent to

proposed Bills, as part of the research have become public knowledge. A number of articles have been written<sup>29</sup> which have caused considerable controversy. The procedure has been called “..an affront to democratic values”<sup>30</sup> and a “...scandal and anachronism”<sup>31</sup>. It was even considered necessary for Downing Street to issue a statement confirming “Prince Charles consent to remain”<sup>32</sup>.

If the work associated with this thesis has succeeded in shedding a little more light on the Duchy of Cornwall then that is a satisfactory outcome.

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<sup>29</sup> Rojas, J-P. Ford, “Prince Charles ‘consent’ correspondence with ministers revealed for the first time” *Daily Telegraph* 29<sup>th</sup> March 2012 and Goodwin, P., “Veil lifted on Prince’s veto involvement on legislation” *Western Morning News* 31<sup>st</sup> March 2012

<sup>30</sup> Booth, R., “Prince Charles offered veto over politicians” *The Guardian* 31<sup>st</sup> October 2011

<sup>31</sup> Hastings, C., “Revealed: How George Osborne asked Charles’s permission for law change that made the Royal Family millions.” *The Mail on Sunday* 1<sup>st</sup> April 2012

<sup>32</sup> BBC News Politics: [www.bbc.co.uk/uk-politics-15521777](http://www.bbc.co.uk/uk-politics-15521777)



## **APPENDICES**

## **Appendix A**

### **The Earls and Lords of Cornwall - 1066 to the Creation of the Duchy**

## The Earls of Lords of Cornwall from 1066 to the Creation of the Duchy<sup>1</sup>

<b>Year</b>	<b>Monarch</b>	<b>Name of Earl or other Person holding “County” Of Cornwall</b>	<b>Comments</b>
<b>1068</b>	<b>William I</b>	<b>Brian (Brient) of Bretagne</b>	<b>Relative of William</b>
<b>1070</b>	<b>William I</b>	<b>Robert Earl of Mortain half brother of William I</b>	<b>The precise date when Robert became Earl is uncertain</b>
<b>1097</b>	<b>Henry I</b>	<b>William succeed his father Robert</b>	<b>William rebelled and was deprived of the title son of Adela, daughter William I</b>
<b>1106</b>	<b>Henry I</b>	<b>Stephen de Blois</b>	<b>Descendant Brian of Brittany</b>
<b>1135</b>	<b>Stephen</b>	<b>Alain de Bretagne</b>	
<b>1140</b>	<b>Stephen</b>	<b>Reginald de Dunstanville</b>	
<b>1176</b>	<b>Henry II</b>	<b>Baldwin de Betune</b>	<b>Son of Reginald</b>
<b>1189</b>	<b>Richard I</b>	<b>John</b>	<b>Kings Brother</b>
<b>1199</b>	<b>Earldom in custody of Crown</b>		
<b>1216</b>	<b>John</b>	<b>Henry Fitz-Count</b>	<b>Son of Reginald</b>
<b>1220</b>	<b>Earldom in custody of Crown</b>		

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<sup>1</sup> Peter, O., “A Tabular Statement of the Earls and Dukes of Cornwall from AD 1068 to AD 1914” (1915)  
*Journal of the Royal Institute of Cornwall*, Volume XX Part 1 Journal No. 62

<b>1227</b>	<b>Henry III</b>	<b>Richard – Kings brother, Earl of Poitou and Cornwall and King of the Romans</b>
<b>1272</b>	<b>Henry III</b>	<b>Edmund son of Richard – King of the Romans</b>
<b>1307</b>	<b>Edward II</b>	<b>Piers Gaveston</b>
<b>1327</b>	<b>Edward III</b>	<b>John of Eltham brother of Edward III – Last Earl of Cornwall</b>
<b>1337</b>		<b>Creation of the Duchy</b>



**Appendix B**

**The Duke's of Cornwall**

## THE DUKES OF CORNWALL<sup>1</sup>

<b>Name</b>	<b>Born</b>	<b>Came into Dukedom</b>	<b>Died/ ascended to throne</b>	<b>Years</b>
Edward	1330	1337	1376	39
Richard	1366	1376	1377	1
Henry	1388	1399	1413	14
Henry	1421	1422	1422	1
Edward	1453	1455	1461	6
Edward	1470	1471	1483	12
Edward	1473	1483	1485	2
Arthur	1485	1489	1502	3
Henry	1492	1502	1509	7
Edward	1537	1537	1547	10
Henry	1595	1610	1612	2
Charles	1600	1615	1625	13
Charles	1630	1645	1649	19
James		1688	1702	14
George	1684	1714	1727	13
Frederick	1707	1727	1751	24
George	1762	1762	1820	58
Albert	1841	1841	1901	60
George	1865	1901	1910	9
Edward	1894	1910	1936	26

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<sup>1</sup> Peter, O., "A Tabular Statement of the Earls and Dukes of Cornwall from AD 1068 to AD 1914" (1915)  
*Journal of the Royal Institute of Cornwall*, Volume XX Part 1 Journal No 62

Charles            1948            1952            to date





## **Appendix C**

### **Charters of the Earldom and Duchy of Cornwall**

## **CHARTERS OF THE EARLDOM AND DUCHY OF CORNWALL**

**Charter of Henry III (1231)**

**- Richard, Earl of Poitou and Cornwall, King of the Romans**

**Charter of Edward II (1307)**

**- Piers de Gaveston, Earl of Cornwall**

**Charter of Edward II (1318)**

**- Isabella, Queen of England**

**Charter of Edward III (1331)**

**- John of Eltham, Earl of Cornwall**

**Charter of Edward III (1332)**

**- John of Eltham, Earl of Cornwall**

**Patent creating Earl of Salisbury (16<sup>th</sup> March 1337)**

**Charter Edward III (17<sup>th</sup> March 1337)**

**- The Duchy of Cornwall (The Great Charter)**

**Charter Edward III (18<sup>th</sup> March 1337)**

**Charter Edward III (3<sup>rd</sup> January 1338)**

**The Fordington Charter Edward III (9<sup>th</sup> July 1343)**

**Inspeximus Charter of King Henry VII (30<sup>th</sup> April 1488)**

**CHARTER OF  
15 HENRY III  
RICHARD, EARL OF POITOU and CORNWALL,  
KING OF THE ROMANS  
(1231)<sup>1</sup>**

Henry the King etc greeting. Know ye that we have given granted, and by this charter confirmed, to our dear brother Richard, Earl of Poitou and Cornwall, the whole county of Cornwall, with the stannary of Cornwall, and all mines and other appurtenances of the same county, and of the stannary aforesaid, to have and to hold of us and our heirs to the same Earl and his heirs, by doing therefore to us and our heirs the service of five knights-fees, for all service and all custom and all demands: wherefore we will, etc. that the same Earl and his heirs shall have and to hold of us and our heirs the aforesaid county of Cornwall, with the aforesaid Stannary, and all mines and other appurtenances of the same county, without any retenement, well and in peace, freely, quietly, and entirely, as is aforesaid.

These being witnesses:

The Venerable Father P. Bishop of Winchester

H de Burgo etc

R. Earl of Chester and Lincoln

W. Earl Warren

W. de Ferrars, Earl of Derby

W. de Fortibus

Etc etc

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<sup>1</sup> Concanen, George, *A Report of the Trial at Bar Rowe v Brenton* (1830) Appendix p 3

**CHARTER OF  
1 EDWARD II  
FOR PIERS DE GAVESTON, EARL OF CORNWALL<sup>2</sup>**

**(1307)**

The King to the Archbishops, bishops, abbots, priors, earls barons, justices, reeves, ministers, and all his bailiffs, and faithful people, greeting. Know ye that we have granted and by this our charter have confirmed to our dear and faithful Piers de Gaveston, knight, our whole County of Cornwall, with the castles, towns, manors, hundreds, demesnes, homages and service of free tenants, rents, villenages, villiens, their chattels, and sequels, knights' fees, advowsons of churches, abbies, priories, hospitals, chapels, fairs, markets, warrens, wrecks of the sea, and all other liberties, free customs, rights, and all other things whatsoever to the aforesaid county belonging, and also the office of sheriff of the said county, the Stannary and all mines of tin and lead which were of Edmund, late Earl of Cornwall in the county aforesaid. We have also given and granted to the aforesaid Peter our castle of Lideford with the appurtenances, the whole moor and free chase of Dartmoor with the appurtenances, the town of Exeter with the appurtenances, the castle town, and honour of Knaresborough, with the free chase of Knaresborough and all other appurtenances, the manors of Rontheclive and Aldburgh, with the members and all other appurtenances, the castle, town and honour of Wallingford with the appurtenances, the manor of Wathyngton with the appurtenances, the manor of Bensington with the appurtenances, four hundreds and a half of Chiltern with the appurtenances, the hundred of Saint Waleric with the appurtenances, the manor of Beckley with the members and other appurtenances, the castle and manor of Mere with the members and other its appurtenances, the town of Chichester with the appurtenances, the manor of Newport juxta Walden with members and its appurtenances, the town of Wilton with the appurtenances, the manor of Cosham with its appurtenances and one hundred pounds rent of the manor of Lychelade to be annually taken by the hands of the abbot of Hayles and his successors, with all services of the same abbot and his successors aforesaid due; and also all other castles, towns, manors, lands, and tenements which the aforesaid Edmund

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<sup>2 2</sup> Concanen, George, *A Report of the Trial at Bar Rowe v Brenton* (1830) Appendix p 27

had and held on the day of his death of his acquiring or his ancestors as well by gifts and grants of our progenitors, heretofore kings of England, as of others whomsoever in whatsoever counties of England they may be, with demesnes, homages, services of free tenants, rents villienages, villiens, and their sequels and chattels, knights fees, advowsons of churches, abbies, priories, hospitals, and chapels, together with fairs, markets, warrens, wrecks of the sea and all other liberties of the aforesaid castles, towns, manors, honors, hundreds, lands, and tenements to anywise belonging.

“To have and to hold the same Peter and his heirs, of us and our heirs, with all things to the aforesaid county, castles, manors, towns, honours, lands, tenements, hundreds, office of sheriff, Stannary mines, and chases pertaining, as is aforesaid for ever, as entirely as the aforesaid Edmund held the day of his death, and as to the lands of the Lord Edward of celebrated memory late King of England, our father, they came” doing to us and to our heirs, the service of three knights-fees for all services therefore belonging to us and our heirs therefore pertaining. Moreover we have granted the same Peter that all castles, manors, towns, honours, lands tenements, rents, and hundreds, and the office of sheriff in the county of Rutland, with knights fees, advowsons of churches, abbies, priories, hospitals, chapels, services of free tenants, villieneges, villiens, their chattels and sequels, fairs, markets, warrens, wrecks of the sea and all other liberties, free customs, rights, and other their appurtenances whatsoever, which Margaret, who was the wife of the aforesaid Edmund, holds dower of our inheritance, and which after the death of the same Margaret to us or our heirs ought to revert, after the decease of the same Margaret, to the aforenamed Peter shall remain for ever. And moreover, we have granted to time same Peter that one hundred shillings rent which William le Ken receives for his life, and one hundred shillings rent which Philip de Kent receives for his life, and ten marks rent which Henry of Chichester receives for his life by the hands of the mayor and commonalty of London by gift and grant of the aforesaid Edmund, out of a certain rent of 50*l* due for Queenhithe, London; and which after the death of the aforesaid William, Philip, and Henry, to us and our heirs likewise ought to revert after the decease of the aforesaid William, Philip, and Henry, shall remain to time same Peter and his heirs for ever. To have and to hold to the same Peter and his heirs of us and our heirs, together with the aforesaid county, castles, manors, towns, honors, hundreds, rents, offices of sheriffs,

stannaries, and mines, and all other things whatsoever before-named by the service aforesaid. We will also and grant for us and our heirs that the aforesaid Peter and his heirs for ever shall have, in the aforesaid county, castles, manors, towns, honors, hundreds, rents, lordships, offices of sheriffs, chases, stannaries, mines, and other things abovesaid whatsoever, all liberties and free customs which the aforesaid Edmund had on the day of his death, and which he used in the same, and shall freely enjoy and use all the liberties and free customs aforesaid. Wherefore we will and firmly command for us and our heirs, that the aforesaid Peter shall have and hold of us and our heirs to him and his heirs the aforesaid County of Cornwall, with the castles, towns, manors, hundreds, demesnes, homages, and services of free tenants, rents, villenages, villeins, their chattels and sequels, knights'-fees, advowsons of churches, abbies, priories; hospitals and chapels, fairs, markets, warrens, wreck of the sea, and all other liberties, free customs, rights, and other things whatsoever, to the aforesaid county belonging: and also the office of sheriff of the said county, the stannary and all mines of tin and lead, which were of Edmund, late Earl of Cornwall, in the county aforesaid, and also the aforesaid castle and manor of Lideford with the appurtenances, the whole moor and free chase of Dartmore with the appurtenances, the town of Exeter with the appurtenances, the castle, town, and honour of Knaresburgh with the free chase of Knaresburgh, and all other its appurtenances, the manors of Reuthecliff and Aldburgh with the members and other their appurtenances, the castle, town, and honour of Wallingford with the appurtenances, the manor of Watlington with the appurtenances, the manor of Bensington with the appurtenances, four hundreds and an half of Chiltern with the appurtenances, the honour of Saint Waleric with the appurtenances, the manor of Beckley with the members and other its appurtenances, the castle and honour of Mere with the members and others their appurtenances, the town of Chichester with the appurtenances, the manor of Newport juxta Walden with the members and other its appurtenances, the town Wilton with the appurtenances, the manor of Cosham with the appurtenances, and the aforesaid one hundred pounds rent out of the manor of Lychlade, to be received annually by the hands of the abbott of Hayles, and his successors, with all service of the same abbott and of his successors aforesaid, therefore due and also all other castles manors, lands, and tenements which the aforesaid Edmund had and held on the day of his death, of his acquiring, or of his ancestors, as well

by the gifts and grants of our progenitors, heretofore Kings of England, as of others whomsoever, in whatsoever counties of England they may be, with all things to the same as is aforesaid in any wise belonging, for ever, doing to us and to our heirs the service of three knights' -fees for all service to us and to our heirs therefore pertaining. And also that all the castles, manors, towns, honours, lands, tenements, rents, and hundreds, and the office of sheriff in the county of Rutland, with the knights' fees, advowsons of churches, abbeys, priories, hospitals, chapels, services of free tenants, villenages, villeins, and their chattels and sequels, together with fairs, markets, warrens, wreck of the sea, and all other liberties, free customs, rights, and other their appurtenances whatsoever, which the aforesaid Margaret holds in dower of our inheritance, and which, after the death of the said Margaret, to us and our heirs ought to revert, shall remain after the decease of the same Margaret to the aforesaid Peter, and to his heirs for ever. And that the hundred shillings rent which William le Ken, for his life, and the hundred shillings rent which Philip of Kent, for his life, and ten marks rent which Henry of Chichester, for his life, receive by the hands of the mayor and commonalty of London, of our gift and grant, as is aforesaid, and which, after the death of the aforesaid William, Philip, and Henry, to us and to our heirs likewise ought to revert, shall remain after the decease of the aforesaid William, Philip, and Henry, to the same Peter and to his heirs for ever, together with the aforesaid county, castles, manors, towns, honours, hundreds, rents, offices of sheriffs, stannaries, and mines, and other things above said whatsoever, by the service above said. Moreover, we will and firmly command, for us and our heirs, that the aforesaid Peter, and his heirs for ever, shall have in the aforesaid castles, manors, towns, honours, hundreds; rents, lordships, offices of sheriffs' chases, stannaries, mines, and other things whatsoever aforesaid, all liberties and free customs which the aforesaid Edmund had on the day of his death, and which he used in the same as is aforesaid

These being witness Henry de Lacy, Earl of Lincoln, Thomas, Earl of Lancaster; John de Warren etc

Given by our hand at Dumfries, the sixth day of August in the first year of our reign.



**CHARTER OF  
11 EDWARD II  
FOR ISABELLA, QUEEN OF ENGLAND<sup>3</sup>**

**(1318)**

“The King to all to whom, &c. greeting. Know ye that in part “satisfaction of a sum of money which Isabella, Queen of England, our “most dear consort, for the expenses of our household, receives annually at our Exchequer, we have granted and assigned to her “the sheriffalty of Cornwall, and all our castles, towns, manors, “lands, and tenements, in the County of Cornwall, to have, according “to the extent thereof, made or otherwise to be made, as long as it “shall please us, with hundreds, views of frank pledge, liberties, free “customs, knights’-fees, for Isabella, Queen of England,” advowsons of churches, religious houses and hospitals, and all other things to the aforesaid sheriffalty, castles, towns, manors, lands, and tenements in any wise belonging, as fully and entirely as we held the same in our hands, and that she shall have all fines, redemptions, amercements, of all men and tenants of the same castles, towns, manors, lands and tenements, and with the fees of the same, and the issues, forfeitures, and all other things which can pertain to us of year, day waste, forfeitures, and murders, in whatsoever our courts, of those men and tenants, as well before us, and in our Chancery, as before our Treasurer and Barons of the Exchequer, and before our Justices Itinerant for Common Pleas and Pleas of the Forest, and also before other our Justices and Ministers whatsoever, such fines and redemptions happen to be made or amerced, or that such issues, murders, forfeitures, year, day and waste, happen to be adjudged, so that the same, our consort, by the hands of the sheriff of the county aforesaid, may levy, receive, and have the fines, redemptions, and amercements of the men and tenants aforesaid, and the issues, forfeitures, and all things which can pertain to us of year, day, waste, forfeitures, and murders, in the same castles, towns, manors, lands, and tenements, and the fees of the same, which before the Judges’ Itinerant for Common Pleas and Pleas of the Forest, happen to be made and adjudged by estreats thereof of the justices itinerant in their iters to the same sheriff delivered, and also the fines, redemptions, and amercements of the men and tenants

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<sup>3 3</sup> Concanen, George *A Report of the Trial at Bar Rowe v Brenton* (1830) Appendix p 31

aforesaid, and the issues, forfeitures, and all other things which can pertain to us of year, day, waste, forfeitures, and murders in the same castles, towns, manors, lands, and tenements, and in the fees of the same before us and in our Chancery, or before our Treasurer and Barons of the Exchequer, or before our Justices, and other whomsoever shall happen to be made and adjudged, by estreats of our Exchequer to the sheriff of the same county thereof delivered, without the hindrance or impediment of us or of our bailiffs or ministers whomsoever. And that she shall have in the same castles, towns, manors, lands, and tenements, and in the fees of the same, the chattels of felons and fugitives, so that if any of her men or tenants for his offence ought to lose life or member, or shall fly and refuse to stand to judgment, or shall make any other default for which he ought to lose his chattels, wheresoever justice ought thereupon to be done, whether in Our court, or in another court, those chattels shall be to our aforenamed consort; and it shall be lawful for our aforesaid consort, or her ministers, to take possession the chattels aforesaid, and the same to retain to the use of the same our consort, without the 'hindrance or impediment. of us our sheriffs, or other our bailiffs, or ministers whomsoever: nevertheless, so that the sheriff of the same county who for the time shall be, shall answer to us at our Exchequer for our debts to our use in the same county to be levied, as long as our said consort shall have the sheriffalty, castles, towns, manors, lands, and tenements abovesaid. In testimony whereof, &c. witness the King, at Nottingham, the 25th day of July,

By the King himself.

**CHARTER OF**  
**4 EDWARD III**  
**FOR JOHN OF ELTHAM, EARL OF CORNWALL<sup>4</sup>**

**(1331)**

The King to the same (archbishops, bishops, &c.) greetings Know ye, that whereas we willing to honour the person of our beloved and faithful John of Eltham, our most dear brother, and given him the name and honour of Earl of Cornwall have preferred, and girt with a sword, as Earl of the same place; and that the same, our brother, may be more decently to sustain the name and honour of Earl, we have given, granted, and by this our charter confirmed to the same Earl, 20*l* of yearly rent, under the name and honour of Earl of Cornwall, of the issues of the County of Cornwall, by the hands of the steward or sheriffs to be received. And also the castles, manors, lands, and tenements under written; to wit, the manor of Hadleigh, with the appurtenances, in the county of Suffolk; the castle and manor of Eye, with the hamlets of Dalyngho, Alderton, and Thorndon, and other appurtenances in the said county, 20*l* of yearly rent, which the prior and convent of Bromholm render for the manor of Baketon, in the county of Norfolk; a certain yearly rent belonging to the honour of Eye, in the said counties of Norfolk, Suffolk and Lincoln, and in the county of Essex, together with the wardship of the same castle of Eye, and the free-court belonging to the same honour, in the same county of Lincoln; certain lands and tenements in Clapton, with the appurtenances, in the same county; the castle and town of Berkhamstead, with the honour and other its appurtenances, in the county of Hertford; the manor of Risbergh, with the park and other its appurtenances, in the county of Bucks; the manor of Cippenham, with its appurtenances, in the same county

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<sup>4</sup> Concanen, George *A Report of the Trial at Bar Rowe v Brenton* (1830) Appendix p 224

**CHARTER OF**  
**5 EDWARD III.**  
**FOR JOHN ELTHAM, EARL OF CORNWALL**<sup>5</sup>

(1332)

For John OF ELTHAM, EARL of CORNWALL.—The King to the archbishops, &c. greeting. Know ye that whereas we being lately willing to honour the person of our dear and faithful John de Eltham, Earl of Cornwall, our most dear brother, we have given to him the name and honour of Earl of Cornwall, and we have created him Earl of Cornwall, and have girt him with a sword as Earl of the said place; and to the same Earl we have subsequently given and granted twenty pounds of yearly rent under the name and honour of Earl of Cornwall, out of the issue and profits of the County of Cornwall, to be taken by the hands of the steward or sheriff of Cornwall, who for the time shall be. Also, we have given and granted by our charter divers castles, manors, lands, and tenements, to the value of two thousand marks of land by the year, to have and to hold to the same Earl and his heirs of his body, lawfully begotten of us, and of our heirs, by the service of two knights'-fees for all service for ever, as in our charter aforesaid is more fully contained. We, that our same brother may be able more suitably to sustain the state and honour of an Earl, willing further to provide for him, have given and granted, and by this our charter have confirmed to the same Earl, beyond the said twenty pounds yearly, and two thousand marks of land afore the castles, manors, lands, and tenements underwritten; namely the castle, borough, and manor of Tyntagel with the appurtenances in the County of Cornwall; the manor of Clymeslond, with the park and other its appurtenances, in the same county; the manor of Tybeste, with the bailiwick of Pondershire, and other its appurtenances, in the same county; the castle of Rostormel, with the park and other its appurtenances, in the same county; the manor of Teuyngton, with the appurtenances, in the same county; the castle and manor of Tremeton, with the park and other their appurtenances, in the same county; the manor of Helleston in Kyrier, with the appurtenances, in the same county; the manor of Moreske, with the appurtenances, in the

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<sup>5</sup> Concanen, George *A Report of the Trial at Bar Rowe v Brenton* (1830) Appendix p 33

“same county; the manor of Touarnail, with the appurtenances, in the same county; the manor of Pengneth, with the appurtenances, in the same county; the manor of Penlyn, with the park and other its appurtenances, in the same county; the castle and borough of Launceston, with the appurtenances, in the same county; the manor of Rellaton, with the bedelary of Istwevelshire, and other its appurtenances, in the same county; the manor of Helleston, in Trigg, with the park and other its appurtenances, in the same county; the manor of Lyskyret, with the park and other its appurtenances in the same county; the manor of Calistoke, with the fishery and other its appurtenances, in the same county; the manor of Talskydi, with the appurtenances, in the same county. The manor of Watlynton, with the appurtenances, in the county of Oxford; the castle and manor of Mere, with the appurtenances, in the county of Wilts; and fourteen pounds, three shillings, and five-pence halfpenny farthing rent, out of the issues of the County of Cornwall, to be received by the hands of our steward or sheriff there, who for the time shall be.

To have and to hold to the aforementioned Earl, and to his heirs aforesaid, together with knights'-fees, advowsons of churches, chapels, abbies, priories, religious houses and hospitals, and with markets, fairs, chaces, parks, warrens, fisheries, and all other liberties and free customs to the same castles, boroughs, manors, parks, bailiwick, bedelary, fishery, and rent, howsoever belonging, of us and our heirs, by the service of one knight's-fee for all service for ever, in value one thousand marks of land by the year so that if the same Earl shall die without heir of his body lawfully begotten, then the castles, boroughs, manors, parks, bailiwick, bedelary, fishery, and rents aforesaid, with the appurtenances, together with knights'-fees, advowsons of churches, chapels, abbies, priories, religious houses and hospitals, and with markets, fairs, chaces, parks, warrens, fisheries, and all other liberties and free customs to the same castles, boroughs, manors, parks, bailiwick, bedelary, fishery, and rent howsoever belonging, shall wholly revert to us and our heirs. Wherefore we will, and firmly command for us, and for our heirs, that the aforesaid Earl shall have beyond the said twenty pounds annually, and the two thousand marks of land aforesaid, the same castles, boroughs, manors, parks, bailiwick, bedelary, fishery, with the appurtenances, and fourteen pounds, three shillings, and five-pence, one halfpenny, and one farthing rent aforesaid, out of the issues of the said County

of Cornwall, to be received by the hands of the steward or sheriff there, who for the time shall be, together with knights' fees, advowsons of churches, chapels, abbies, priories, religious houses and hospitals, and with markets, fairs, chaces, parks, warrens, fisheries, and all other liberties and free customs to the aforesaid castles, boroughs, manors, parks, bailiwick, bedelary, fishery, and rent howsoever belonging, to him and to his heirs of his body lawfully begotten, of us and of our heirs, by the service of one knight's-fee for all service for eve in value one thousand marks of land by the year aforesaid, so that if the same Earl shall die without heir of his body lawfully begotten, then the castles, boroughs, mailers, parks, bailiwick, bedelary, fishery, and rent aforesaid, with the appurtenances, together with the knights' advowsons of churches, chapels, abbies, priories, religious houses and hospitals, and with markets, fairs, chaces, parks, warrens, fisheries, and all other liberties and free customs to the same castles, boroughs, manors, parks, bailiwick, bedelary, fishery, and rent howsoever belonging, to us and to our heirs, shall wholly revert, as is aforesaid. These being witnesses the venerable fathers, S., Archbishop of Canterbury, Primate of all England; J., Bishop of Winchester, our Chancellor; W., Bishop of Norwich, our Treasurer; John de Warren, Earl of Surrey; Thomas, Earl of Norfolk, and Marshal of England; Henry de Percy; Gilbert Talbot; Ralph de Nevill, Steward of our Household, and others. Given by our hand, at 'Westminster, the tenth day of October.

By the King himself.

And it is commanded to W Botereux, steward of Cornwall, that he should cause to be delivered to the same Earl, or to his attorney in this behalf, the aforesaid castle, borough, "and manor of Tyntagel, the manor of Clymeslond with the park, the manor of Tybeste with the bailiwick of Pondershire, the "castle and manor of Rostormel with the park, the manor of "Teuyngton, the castle and mairor of Tremeton with the park, "and manor of Helleston in Kerrier, the manor of Moreske, the manor of Touarnail, the manor of Pengneth, the manor of Penlyn, the castle and borough of Launceston, the manor of Rellaton with the bedelary of Istwevelshire, the manor of Helleston in Trigg with the park, the manor of Liskiret with the park, the manor of Calistoke with the fishery, and the manor of Talskydy with the "appurtenances" to have according to the tenor of the King's charter above said. Witness as above. By the King himself.

And it is commanded to the keeper of the castle and manor of Mere, in the county of Wilts, that he shall deliver to the same Earl, or to his attorney in this behalf, the castle and manor aforesaid said, with the appurtenances, to have, &c. as above. Witness as above.

By the King himself.

## **PATENT ROLL CREATING**

### **EARL OF SALISBURY**

**11 Edward III<sup>6</sup>**

**(16<sup>th</sup> March 1337)**

The King to the Archbishops, &c. greeting. Know ye that whereas the glory of Princes consists in the multitude of wise and exalted subjects, and that by so much the more the regal throne is raised up, and a Government of a kingdom is strengthened as there are subject to them nobles of dignity and pre-eminence; we, at the request of the prelates and nobles, and also of the Commons of our kingdom assembled in our present Parliament convened at Westminster, willing more securely to establish the Royal sceptre as well as by the addition of new honors as by the restorations of old ones, and to augment the number of nobles by whose counsels our realm may be directed in doubtful, and by whose suffrages be supported in adverse circumstances, have advanced our most dear first begotten Edward (whom in the prerogative of honour as is meet, we have caused to have precedence of others) to be Duke of Cornwall, over which awhile ago Dukes for a long time successively presided as chief rulers. And of the said Duchy we have given him investiture by girding a sword upon him, as is the custom. Considering also among others whom we have promoted to be Earls of divers places, the strict probity and circumspect prudence, and the renown as regards both virtue and lineage of our beloved and faithful William do Monteacuto; and also the expenses and dangers to which he hath submitted himself for us and ours at all times with ready promptitude; and also hoping that an addition of honour will add a grateful increase as well to in his probity as to his fidelity towards us; we, by the definite advice of our said Parliament, in consideration of the premises, and with a grateful remembrance of the accepted and useful services by him hitherto rendered, have given him investiture of the County of Salisbury, by girding a sword upon him, freely granting to him and his heirs the name and style of Earl of the said place. And that the same Earl and his heirs may be able the better and more honourably to support the burthens incumbent on them in a manner befitting so high a

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<sup>6</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall 1854-1856 Arbitration by Sir John Patteson Appendix L



name and honour; we have given and granted and by this our Charter have confirmed to the same Earl and his heirs twenty pounds of rent out of the issues of the County of Wilts every year at the Feasts of Easter and Saint Michael, by equal portions to be paid by the hands of the Sheriff for the time being of that County for ever. Wherefore we will and strictly command for us and our heirs that the aforesaid Earl and his heirs may perceive the aforesaid *20l.* of rent from the issues of the County aforesaid every year at the Feasts aforesaid, in equal portions by the hands of the Sheriff for the time being of that County for ever as is before said. These persons being witnesses, &c. Given under our hand at Westminster, the 16th day of March.

By the King himself and all his Council in full Parliament.

# CHARTER

## 11 Edward III

### (also known as the Great Charter of Creation of the Duchy of Cornwall)<sup>7</sup>

(17<sup>th</sup> March 1337)

For Edward, Duke of Cornwall

Edward by the grace of God, King of England, Lord of Ireland and Duke of Aquitaine, To his archbishops, bishops, abbots, priors, earls, barons, justices, sheriffs reeves, ministers, and all bailiffs and lieges, greeting: Amongst the glories of royalty We esteem this the chiefest, that it be fortified by a suitable distribution of orders, dignities, and offices, supported by sound counsels, and upheld by the strength of the brave; and inasmuch as many hereditary titles in Our kingdom, as well by the descent of inheritances, according to the law of this kingdom, to co-heirs and parceners, as also by default of issue, and by various events have come to Our royal hands, whereby Our said kingdom hath long time suffered great deficiency in names, and honors, and in the dignity of ranks, We therefore earnestly meditating those things whereby Our kingdom may be adorned, and whereby Our said kingdom and the holy church thereof, and the other lands subject to Our dominion, may be more securely and honourably defended against the attempts of their enemies and adversaries, and desiring to dignify the chief places of Our kingdom with their ancient honour, and turning Our attention closely to the person of Our well beloved and faithful Edward, Earl of Chester, Our first begotten son, and We wishing to honour the person of Our said son, have, with the common consent and counsel of the prelates, earls, barons, and others of Our council in this Our present Parliament at Westminster, upon Monday next after the Feast of St. Matthias the Apostle last past, being assembled, given to Our said son the name and honour of Duke of

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<sup>7</sup> Manning, J., *Reports of cases argued and determined in the Court of Kings Bench during Michaelmas Term Ninth Geo IV* (1830) p 474 - 482

Cornwall, and have constituted him Duke of Cornwall, and girt him with a sword, as behoveth. And that there may be no doubt hereafter, what, or how much the same duke, or other dukes of the same place for the time being, under the name of the said dukedom ought to have, Our will is, that all in specialty which to the said dukedom doth belong be inserted in this Our charter. Therefore, for Us and Our heirs, We have given and granted, and by this Our charter confirmed to Our said son, under the name and honour of duke of the said place, the castles, manors, lands, tenements, and other things under written, that he the state and honour of such duke may uphold according to the nobility of his race, and the charges and burthens thereof the better to support, that is to say: The shrievalty of Cornwall, with the appurtenances, so as the said duke, and other dukes of the same place for the time being, do make, constitute, and appoint sheriffs of the said county of Cornwall at their will and pleasure and to do and execute the office of sheriffs there as heretofore it used to be done, without any hindrance of Us or Our heirs for ever; as also the castle, borough, manor, and honour of Launceneton , With the park there, and other its appurtenances in the counties of Cornwall and Devon; the castle and manor of Tremeton, with the town of Saltesh, and the park there, and other its appurtenances in the said counties; the castle, borough, and manor of Tyntagell, with the appurtenances in the said county of Cornwall; the castle and manor of Restormel, with the park there, and other its appurtenances in the same county; and the manor of Clymmeslond, with the park of Kerribullok, and other its appurtenances; Tybeste, with the bailiwick of Poudershire, and other its appurtenances; Tewynton, with the appurtenances; Helleston in Kerrier, with the appurtenances; Moresk, with the appurtenances; Tewernaill, with the appurtenances; Pengkneth, with the appurtenances; Penlyn, with the park there, and other its appurtenances; Rellaton, with the bedelry of Estwyneleshire, and other its appurtenances; Helleston, in Trygsbire, with the park of Hellesbury, and other its appurtenances; Lyskeret, with the park there, and other its appurtenances; Calystock, with the fishery there, and other its appurtenances; and Talskydy, with the appurtenances, in the same county of Cornwall; and the town of Lostwithiell in the same county, with the mills there, and other its appurtenances; and Our prizage and customs of wines in the said county of Cornwall; and also all the profits of Our ports, within the same county of Cornwall to us belonging together with wreck of the sea as well of whales and sturgeon

other fishes which do belong to Us by reason of our prerogative as whatsoever other things belong to such wreck of the sea, with the appurtenances in all Our said county of Cornwall; and the profits and emoluments to Us belonging, of Our county Courts holden in Our county of Cornwall, and of hundreds and Courts thereof in the said county; as also Our Stannary in the said county of Cornwall. together with the coinage of the said Stannary and all issues and profits thereof arising; and also the explees, profits, and perquisites of the Court of Stannary, and the mines of the said county, except only 1000 marks, which to Our beloved and faithful William de Monte-Acuto, Earl of Salisbury, We have granted, for Us and Our heirs, to be taken to him, and the heirs male of his body lawfully begotten, of the issues and profits of the aforesaid coinage, until there should come to his or their hands the castle and manor of Tonbridge, with the appurtenances in the county of Wilts, and the manors of Aldeburn, Ambresbury, and Winterbourn, with the appurtenances in the said county, and the manor of Caneford, with the appurtenances in the county of Dorset, and the manors of Henstrig and Charleton, with the appurtenances in the county of Somerset, which Our beloved and faithful John de Warren, Earl of Surrey, and Joan his wife, hold for the term of their lives, and which after their deaths to Us and Our heirs ought to revert, the remainder whereof We have granted, after the decease of the said Earl and Joan, to the aforesaid Earl of Salisbury and the heirs male of his body lawfully begotten, to the value of 800 marks by the year, and also of lands and rents of the value of 200 marks, which to the said Earl of Salisbury to have in form aforesaid, we granted to provide; and also our Stannary in the aforesaid county of Devon with the coinage and all issues and profits of and The issues, profits, and perquisites of the said Court of Stannary, and the water of Dartmouth in the said county, and the yearly farm of £20 of Our city of Exeter and Our prizage and customs of wines, in the water of Sutton in the said county of Devon, as also the castle of Walyngford, with its hamlets and members, and the yearly farm of the town of Walyngford, with the honour, of Walyngford and Saint Vallery, with the appurtenances in the county of Oxford, and other counties wheresoever those honour. may be, and the castle, manor, and town of Berkhamstead, with the park there, together with the honour of Berkhamstead in the counties of Hertford, Buckingham, and Northampton, and other their appurtenances, and the manor of Byflet with the park there, and other it. appurtenances; in the County of

Surry: To have and to hold to the said Duke and to the first begotten sons of him and his Kings of England being dukes of the said place and heirs apparent to the said kingdom of England; together with the knights fees and advowson of churches, abbeyes, priories, hospitals, and chapels, and with the hundreds, fisheries, forests, chases, parks, woods, warrens, fairs, markets, liberties, free customs, wards, reliefs, escheats, and services of tenants, as well free as villein, and all other things to the aforesaid castles, boroughs, towns, manor, honors, Stannaries and coinages, lands and tenements, howsoever and wheresoever be longing or appertaining, of Us and Our heirs for ever, together with 24l. of yearly farm, which Our beloved and faithful John de Meere to Us by the year for all his life is bound to pay for the castle and manor of Meere, with the appurtenances, in the county of Wilts, granted to him by Us for the term of his life, to be taken every year by the hands of the said John for the term of his life, and with the aforesaid 1000 marks yearly to the aforesaid Earl of Surrey of the issues of the coinage aforesaid by Us so granted after seisin obtained by him or his heirs males of his body begotten of the said castle and manor of Tunbridge, and the manors of Aldebourn, Ambresbury, Winterbourn, Caneford, Hengstiigg, and Carleton, after the deaths of the said Earl of Surrey and Joan, and of the land. and rents of the value of 200 marks to the said Earl of Salisbury and the heir. males of his body begotten, so to be provided as an equivalent for their portion of the said castle, manor, land, and tenements, when they shall wholly or partially come to the hands of the said Earl of Salisbury or of the heirs males of his body. We have moreover granted for Us and Our heirs, and by this Our charter We have confirmed, That the castle and manor of Knaresburgh with the hamlets and members thereof and the honour of Knaresburgh, in the county of York, and other counties, wheresoever the same honour may be, the manor of Istilworth, with the appurtenances, in the county of Middlesex, which Philippa, Queen of England, Our most dear consort, holds for term of life, and the castle and manor of Lydeford, with the appurtenances and with the chase of Dertmore, with the appurtenances, in the said county of Devon, and the manor of Bradenesh, with the appurtenances, in the same county, which Our beloved and faithful Hugh d'Audele, Earl of Gloucester, and Margaret his wife hold for the life of the said Margaret; and the said castle and manor of Meere, with the appurtenances, which the aforesaid Joan so for life holdeth of Our grant, and which after the death of the said

Queen, Margaret and John, to Us and Our heirs ought to revert, that is to say, after the decease of the said Queen, the castle and manor of Knaresburgh, with the honor, hamlets and member, thereof aforesaid, and other its appurtenances, and the manor of Istilworth, with the appurtenances, and after the death of the said Margaret, the said castle and manor of Lydeford with the said chase of Dertmore and other its appurtenances, and the manor of Bradeneshe, with the appurtenances, and after the death of the said John, the said castle and manor of Meere, with the appurtenances, shall remain to the aforesaid duke and to the first begotten sons of him and his heirs, kings of England, being Dukes of the said place and heirs apparent to the kingdom of England, as before is said To have and to hold together with the said knights' fees, advowsons of churches, abbeys, priories, hospitals, and chapels, with hundreds, wapentakes, fisheries, forests, chases, parks, woods, warrens, fairs, markets, liberties, free customs, wards, reliefs, escheats, services of tenants, as well free as villein, and all other things to the same castles, manors, and honour, howsoever and wheresover belonging, or appertaining of Us likewise and Our heirs for ever, all which castles, boroughs, towns, manors, honor, Stannaries, coinages, rents (*firmas*) of Exeter and Wallingford, lands and tenements as above are specified, together with the fees, advowsons, and all other things afore said, to the aforesaid duchy, by Our present charter, for Us and Our heirs We do annex and unite to the same for ever to remain, so that from the said duchy at no time they be any ways severed nor to any person or persons other than dukes of the same place, by Us or Our heirs be given, or in any manner granted; so also, as that whenever the abovesaid duke or other dukes of the same place shall depart this life, and a son or sons to whom the said duchy, by virtue of Our grants aforesaid, is appointed to belong shall not then appear, the said duchy, with the castles, boroughs, towns, and other the abovesaid to Us, Our heirs, kings of England, shall revert, to be retained in Our hands and in the hands of our heir, kings of England, until such son or sons, being heir or heirs apparent to the said kingdom of England, shall appear, as before is said, to whom then successively We, for Us and Our heirs, grant and will that the said duchy with the appurtenances be delivered, to hold, as above is expressed; We have moreover for Us and Our heirs granted, and by this Our charter confirmed, to the aforesaid duke, that the said duke and such first begotten sons of him and of his heirs, dukes of the same place, shall for ever have free warren in all the

demesne lands of the castles, lands, and other places aforesaid, so as the said lands be not within the bounds of Our forest; so that none enter into them to hunt in them or to take any thing which to warren appertaineth without the licence and will of the said duke or other dukes of the same place, under forfeiture to Us of *10l.* Wherefore We will and firmly command for Us and Our heirs, that the said duke have and hold to him and the first begotten sons of him and his heirs kings of England, being Dukes of the same place and heirs apparent to the said kingdom of England, the said shrievalty of Cornwall, with the appurtenances, so that they and the other dukes aforesaid, at their wills make and constitute the sheriff of the said county of Cornwall, to do and execute the office of a sheriff there as hitherto it used to be done, without the hindrance of Us or Our heirs for ever. Also the said castle, borough, manor, and honour of Launceston; castle and manor of Tremeton, with the town of Saltesh; castle, borough, and manor of Tyntagel; castle and manor of Rostormel, also the manors of Clymmesland, Tybeste, Tewynton, Helleston in Kerier, Moresk, Tewarnaill, Pengkueth, Penlyn, Rellaton, Helleston in Trygshire, Lyskeret, Calistok, Talskydy, and the town of Lostwythiell, with the appurtenances, together with the park, bailiwick, bedelry, fisheries, and other things abovesaid, in the aforesaid county of Cornwall, and the aforesaid prisages, customs, and profits of ports aforesaid, together with the said wreck of the sea and the said profits and emoluments of the counties, hundreds, and Courts to Us belonging, and the said Stannary in the said county of Cornwall, together with the coinage of the said Stannary, and with all issues and profits thereof arising, and also the explees, profits, and perquisites of the Courts aforesaid (except only the said 1000 marks, which to Our well-beloved and faithful William de Monte-acuto, Earl of Salisbury, We granted, for Us and Our heirs to be taken to him and the heirs males of his body Lawfully begotten, of the issues and profits of the coinage aforesaid, until to his or their hands the said castle and manor of Tonbrigg, with the appurtenances, and the said manors of Aldebourn, Ambresbury, and Winterbourn, with the appurtenances, and the said manor of Hengstrygg and Charlton, with the appurtenances, which the aforesaid Earl of Surry and Joan his wife hold for the term of their lives, and which after their deaths to Us and Our heirs ought to revert, the remainder whereof, after the deceases of the said Earl and Joan, We granted to the said Earl of Salisbury and the heirs males of his body lawfully begotten, to the value of 800 marks by

the year, and the lands and rents of the value of 200 marks, which to the said Earl of Salisbury to have in form aforesaid We granted, shall come, as before is said;) and the said Stannary in the county of Devon, with the coinage and all issues and profits thereof, and also the explees, profits, and perquisites of the Court of the same Stannary, the water of Dertmouth, and the said yearly farm of 20*l* of the said city of Exeter, . . . the said prizage and custom of wines in the water of Sutton, in the county of Devon, as also the aforesaid castle of Walyngford, with its hamlets and members, the yearly farm of the town of Walyngford, with the said honours of Walyngford and St. Valery, the castle, manor, and town of Berkhamsted, with the said honour of Berkhamsted, and the manor of Byflete, with its parks and other appurtenances as aforesaid, together with knights' fees, advowsons of churches, abbeys, priories, hospitals and chapels, and with the hundreds, fisheries, forests, chases, parks, woods, warrens, fairs, markets, liberties, free customs, wards, reliefs, escheats, and services of tenants, as well free as villein, and all other things to the said castles, boroughs, towns, manors, honors, Stannaries and coinages, lands, and tenements, whatsoever and wheresoever, belonging or appertaining, of Us and Our heirs for ever, together with the said 24*l* of annual farm which the aforesaid John de Meere to us yearly for his whole life is bound to pay for the said castle and manor of Meere, granted to him by Us to bold for the term of his life, to be taken yearly by the hands of the said John de Meere all his life, and also with the aforesaid 1000 annual marks to the aforesaid Earl of Salisbury of the profits of the coinage aforesaid by Us so granted, after seisin shall have been obtained by him or the heirs males of his body be gotten, as well of the aforesaid manor of Tonbrigg and manors of Aldebourn, Ambresbury, Winterbourn, Caneford, Hengstrigg, and Charlton, after the decease of the said Earl of Surry and Joan, as also of the said land and rent of the value of 200 marks to the said Earl of Salisbury and the said heirs males of his body, so to be provided as an equivalent for their portion of the said castle, manors, lands, and tenements, when the estate wholly or partially come to the hands of the said Earl of Salisbury, or the heirs males of his body lawfully begotten, as aforesaid; and that the aforesaid castle and manor of Knaresburgh, with its hamlets and members and with the honour of Knaresburgh and the manor of Istilworth, with the appurtenances, after the death of Our aforesaid consort; the castle and manor of Lydeford, with the appurtenances,



and with the said chase of Dertmore, with the appurtenances, and the manor of Bradnesh, with the appurtenances, after the decease of the aforesaid Margaret; and the castle and manor of Meere, with their appurtenances, after the death of the aforesaid John de Meere, shall remain to the said duke, to have and to hold, to him and to the first begotten sons of him and his heirs, kings of England, being dukes of the same place, and heirs apparent to the said kingdom, together with knights' fees and advowsons of churches, abbeys, priories, hospitals, and chapels, and with hundreds, wapentakes, fisheries forests, chases, parks, woods, warrens, fairs, markets, liberties, free customs, wards, reliefs, escheats, and services of tenants, as well free as villein, and all other things to the said castles, manors, and honours, howsoever and wheresoever belonging and appertaining, of Us likewise, and Our heirs for ever, as before is said. All which castles, boroughs, towns, manors, and honours, Stannaries, and coinages, rents (*firmas*) of Exeter and Walyngford, lands and tenements, as above are specified, together with the knights' fees, advowsons, all other things above said, to the said duchy by this Our present charter, for Us and Our heirs, We do annex and unite to the same, to remain for ever, so as from the said duchy at no time hereafter they be severed, nor to any person or persons than the dukes of the same place by Us or Our heirs they be given, or in any ways granted, so, also, as that whenever the said duke, or other dukes of the same place, shall depart this life, and a son or sons to whom the said duchy by virtue of our said grants is appointed to belong, shall not then appear, the same duchy, with the castles, boroughs, towns, and all other things aforesaid, to Us, and Our heirs,. kings of England, shall revert, to be retained in our hands, and in the hands of Our heirs, kings of England, until such son or sons, heir or heirs apparent to the said kingdom of England, shall appear, as before is said, to whom then successively, We, for Us and Our heirs, grant and will that the said duchy, with the appurtenances, be delivered to be holden, as above is expressed; and that the said duke, and the first begotten son of him and of his heirs, dukes of the said place, for ever, have free warren in all the demesne lands aforesaid, so that the same lands be not within the bounds of Our forest, so as that none enter into those lands to hunt in them, or to take any thing which to warren belongeth, without the licence and will of the said duke and the other dukes of the said place, under forfeiture to Us of £10, as before is said.

Witnesses, the venerable John, Archbishop of Canterbury, Primate of all England, Our chancellor; Henry, Bishop of Lincoln, Our treasurer; Richard, Bishop of Durham; John de Warren, Earl of Surrey; Thomas de Bello Campo, Earl of Warwick; Thomas Wake, of Lydell; and John de Mowbray; John Darcy, Le Neveu, steward of Our household, and others. Given by Our hand, at Westminster, the 17th day of March, in the eleventh year of Our reign,

By the king himself and all the council in Parliament

## Charter

### 11 Edward III <sup>8</sup>

(18<sup>th</sup> March 1337)

Edward, by the grace of God, King of England, Lord of Ireland, and Duke of Aquitaine, to his archbishops, bishops, abbots, priors, earls, barons, justices, sheriffs, reeves, ministers, and all his bailiffs, and lieges, greeting. Know, that whereas We lately willing to honour the person of Our faithful and beloved Edward, Earl of Chester, Our first begotten son, did, by the common assent and counsel of the prelates, earls, barons, and others of Our council, (being called together in Our present Parliament at Westminster, on Monday next after the feast of St. Matthias the Apostle last past,) give to Our said son the name and honour of duke of Cornwall, and appointed him to be duke of Cornwall, and girded him with a sword, as it behoved; and that he the state and honour of a duke might be able to maintain in a manner becoming the nobility of his race, and to support his charges in that behalf, We did give and grant by Our charter, for Us and Our heirs, to Our said son, under the name and honour of duke of the said place, the shrievalty of Cornwall, with the appurtenances; also the castle, borough, manor, and honour, of Launceneton, with the parks there, and other its appurtenances in the counties of Cornwall and Devon; the castle and manor of Tremeton, with the town of Saltesh, and the park there, and other its appurtenances In the counties aforesaid, the castle, borough, and manor of Tyntagell, with the appurtenances in the said county of Cornwall; the castle and manor of Rostormell, with the park there, and other its appurtenances in the same county, also the manors of Clymmeslond, with the park of Kerribullok, and others its appurtenances, Tybest, with the bailiwick of Poudershire, and other its appurtenances, Tewynton, with the appurtenances, Helleston, in Kerrier, with the appurtenances, Moresk, with the appurtenances, Tewernail, with the appurtenances, Pengkneth, with the appurtenances, Penlyn, with the park there, and other its appurtenances, Rellaton, with

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<sup>8</sup> Manning, J., *Reports of cases argued and determined in the Court of Kings Bench during Michaelmas Term Ninth Geo IV* (1830) p 482 - 485

the bedelry of Estwynelshire, and other its appurtenances, Helleston, in Tregshire, with the park of Hellesby, and other its appurtenances, Lyskeret, with the park there, and other its appurtenances, Calystok, with the fishery there, and other its appurtenances, Talskydy, with the appurtenances in the same county of Cornwall, and the town of Lostwithiel, in the same county, with the mills there, and other its appurtenances; and Our prizage and customs of wines in the said county of Cornwall; also all profits of Our ports within the said county of Cornwall to Us belonging, together with wreck of the sea, as well of whale and sturgeon and other fishes, which belong to Us by reason of Our prerogative, as also of all other things to wreck of the sea in what manner soever belonging, in all the aforesaid county of Cornwall; also the profits and emoluments to Us belonging of county Courts (*comitatum*) held in the said county of Cornwall, and of hundreds and hundred Courts in that county; also Our Stannaries in the said county of Cornwall, and together with the coinage of the said Stannaries, and with all issues and profits arising therefrom, and the explees, profits, and perquisites of Courts of Stannary and mines in the said county, except only 1000 marks, which We had granted to Our faithful and beloved William de Monte-Acuto, Earl of Sarum, to be received by him and his heirs males of his body lawfully begotten; of the issues and profits of the coinage aforesaid in a certain form, more fully described in Our other charter, to the said duke thereof made, to have and to hold to the said duke, and to the first begotten sons of himself and of his heirs, Kings of England, being dukes of the said place and heirs apparent to the said kingdom of England, together with knights fees and advowsons of churches, abbeys, priories, hospitals, and chapels, and with the hundreds, fisheries, forests, chases, parks, woods, warrens, fairs, markets, liberties, free customs, wards, reliefs, escheats and services of tenants, as well free as bondsmen; and all other things to the said castles, town, manors, honors, Stannaries, coinages, lands, and tenements, howsoever and wheresoever belonging or appertaining, together with certain other manors, lands, and tenements, in divers other counties of Our kingdom, of Us and Our heirs for ever, as in the said other charter is more fully contained: We, willing to do more ample favour to the said duke in this behalf for the support of such honour, have granted for Us and Our heirs, that the said duke, and the first begotten sons of him and his heirs kings of England being dukes of the same place, and heirs apparent to the said kingdom of England, do for ever have

the return of all writs of Us and Our heirs, and of summonses of the Exchequer of Us and Our heirs, and attachments, as well in pleas of the crown as in all others, in all his said lands and tenements in the said county of Cornwall, so that no sheriff or other bailiff or minister of Us or Our heirs enter those lands, or tenements, or fees to execute the said writs and summonses, or attachments, as well in pleas of the crown as in the others aforesaid, or do any other official act (*officium*) there, except in default of the said duke and other dukes of the said place, and his and their bailiffs or ministers in his and their lands, tenements, and fees aforesaid; And also that they have the chattels of their men and tenants in all the county aforesaid, being felons and fugitives, so that if any of their same men or tenants ought for his offence to lose life or limb, or shall flee and refuse to stand to justice (*judicio stare noluerit*), or shall commit any other offence for which be ought to lose his chattels, wheresoever justice ought to be done upon him, whether in the Court of Us or Our heirs or in any other Court, the said chattels shall belong to the said duke and the said other dukes aforesaid, and that it be lawful to them and their ministers, without hindrance of Us and of Our heirs and of others Our bailiffs or ministers whatsoever, to put themselves in seisin of the chattels aforesaid, and to retain them to the use of the said duke and of the other dukes; and also that they for ever have all fines for trespasses and other offences whatsoever, and also fines *pro licentia concordandi*, and all amerciaments, ransoms, issues forfeited, and forfeitures, year day and waste and strip, also the things which to Us and Our heirs may belong of such year day and waste, and of murders, from all the men and tenants of their said lands, tenements, and fees in the said county of Cornwall, in whatsoever Court of Us and of Our heirs it shall happen that these men and tenants are, which before us and Our heirs, and in the chancery of Us and Our heirs, and before the treasurer and barons of Us and Our heirs of the Exchequer, and before the justices of Us and Our heirs of the Bench, and before the steward and marshal and clerk of the market of the household (*hospitii*) of Us and Our heirs, for the time being, and in all other the Courts of Us and Our heirs, as also before justices itinerant for common pleas and pleas of the forest, and any other justices of Us and Our heirs, as well in the presence as in the absence of Us and Our heirs, make fines or be amerced, forfeit issues, or that forfeitures and murders shall be adjudged against them; which fines, amerciaments, ransoms, issues, day year and waste or strip, forfeitures and murders to Us

and Our heirs would belong if they had not been granted to the said duke and the other dukes aforesaid; so that the same duke and other dukes aforesaid, by themselves or by their bailiffs or ministers, may levy, perceive, and have such fines, amerciements, ransoms, issues and forfeitures of their men and tenants aforesaid, and all things which to Us and Our heirs might belong of the day year and waste or strip, and murders aforesaid, without question or hindrance from Us and Our heirs, justices, escheators, sheriffs coroners, and other bailiffs, or ministers whatsoever. Wherefore We will and firmly command for Us and Our heirs, that the said duke and the other dukes of the said place for the time being do for ever have the said liberties as is aforesaid, and do henceforward fully enjoy and use the same.

Witnesses, the venerable Fathers, John, Archbishop of Canterbury, Primate of all England, Our Chancellor; Henry, Bishop of Lincoln, Our treasurer; Roger, Bishop of Coventry and Lichfield; Thomas, Earl of Norfolk and Marshal of England; Our most dear uncles, Richard, Earl of Arundel, and Thomas, Earl of Warr; Thomas Wake, of Lydell; John de Mowbray; John Darcey, le Neveu, Steward of our Household, and others. Given by Our hand at Westminster, the XVIIIth day of March, in the eleventh year of Our reign.

By the King himself and all the council in Parliament

## Charter

### 11 Edward III <sup>9</sup>

(3<sup>rd</sup> January 1338)

Edward, by the grace of God, King of England, Lord of Ireland, and Duke of Aquitaine, to his archbishops, bishops, abbots, priors, earls, barons, justices, sheriffs, reeves, ministers, and all his bailiffs and lieges, greeting. Know, that whereas We lately willing to honour the person of Our faithful and beloved Edward, Earl of Chester, Our first begotten son, did give to Our said son the name and honour of duke of Cornwall, and appointed him to be duke of Cornwall, and girded him with a sword, as it behoved, and that he the state and honour of a duke might be able to maintain in a manner becoming the nobility of his race, and support his charges attaching to such high honor, did give and grant by Our charter, for Us and Our heirs, to Our said son the shrievalty of Cornwall, with the appurtenances, also the castle, borough, manor and honor of Launceneton and divers other castles, boroughs, towns, manors, and honours, in the same county and elsewhere To have and to hold to the said duke and the eldest sons of him and his heirs kings of England, being dukes of the same place and heirs apparent to the said kingdom of England, together with the knights fees, advowsons of churches, and all other things to the said castles, boroughs, towns, manors, and honours in anywise belonging, from Us and Our heirs for ever, as in Our charter thereof to the said duke made is more fully contained, We, willing to provide more abundantly for Our said son, have given and granted for Us and Our heir, and by this Our charter have confirmed to the said duke all Our fees, with the appurtenances which We have in the said county of Cornwall, or which do or shall (*poterunt*) belong or appertain to Us; To have and to hold to the said duke and the first begotten sons of him and of his heirs, king of England, being dukes of the said place and heirs apparent to the said kingdom of England as aforesaid, together with. wards, marriages, reliefs, escheats, forfeitures, and all other profits, issues, and

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<sup>9</sup> Manning, J., *Reports of cases argued and determined in the Court of Kings Bench during Michaelmas Term Ninth Geo IV* (1830) p 485-488

emoluments which belong or shall belong to Us by reason of those fees, or which We and Our heirs might perceive and have if we had retained these fees in Our hands, from all and singular as well those who now hold the fees so by Us given and granted with the said county of Cornwall and those who shall hereafter hold the same, as also from the tenants holding of those fees, when they shall happen, notwithstanding Our prerogative in that behalf, and notwithstanding that the tenants who hold those fees or the tenants who hold of those fees may hold of Us or of Our heirs of Our crown or otherwise, in chief or in any other manner without the said county or within, of Us and Our heir, for ever. Which fees, with the appurtenances all other things aforesaid, as they are above specified, We for Us and Our heirs annex to the said duchy and unite so to remain for ever in the same manner as the said castle, boroughs, towns, manors, and honour. are annexed to the same, so that the same be in no wise severed from the said duchy at any time nor be given or in any wise granted by Us or Our heirs to any other person or persons than to the said dukes of the said place. And moreover We have granted of Our more abundant grace to the said Duke, for Us and Our heirs, that he and the first-begotten sons of him and his heir, kings of England, being dukes of the same place and heirs apparent to the said kingdom of England, do for ever have the returns of all writs of Us and Our heirs, and of summonses of the Exchequer of Us and Our heirs, and attachments, as well in pleas of the Crown as in all others, as well in the same fees, as also in other fees which are held of the same in the said county of Cornwall; so that no sheriff, or other bailiff or minister of Us or Our heirs enter those fees to execute the said writs and summonses or to make attachments, as well in pleas of the Crown as in the others aforesaid, or do any other official act (*officium*) there, except in default of the said Duke and other Dukes of the said place, and his and their bailiff and minister aforesaid; and also that they have the chattels of the tenants holding the fees, and also of the tenants holding of their fees in the county aforesaid, being felons and fugitives, so that if any of the same tenants ought for his offence to lose life or limb, or shall flee and refuse to stand to justice (*Judicio stare noluerit*), or shall commit any other offence for which he ought to lose his chattels, wheresoever justice ought to be done upon him, whether in the Court of Us or Our heir, or in any other Court, the said chattels shall belong to the said Duke and the other Dukes aforesaid, and that it be lawful for them and their ministers, without hindrance of Us or of



Our heirs or of other Our bailiffs or ministers whatsoever, to put themselves in seisin of the chattels aforesaid, and to retain them to the use of the said Duke and of the said other Dukes; and also that they for ever have all fines for trespasses and other offences whatsoever, and also fines pro *licentia concordandi*, and all amerciaments, ransoms, issues forfeited and forfeitures, year day, and waste and strip, and all things which to Us and Our heirs may belong of the said year day and waste and likewise of murders from all tenants holding their fees, and holding of their fees, in the said county, in whatsoever Court of Us and of Our heirs it shall happen that these tenants, as well before Us and Our heirs and in the Chancery of Us and our heirs and before the Treasurer and Barons of Us and Our heirs of the Exchequer, and before the Justices of Us and Our heirs of the Bench, and before the steward and marshal and clerk of the market of the household of Us and Our heirs for the time being, and in all other the Courts of Us and Our heirs, as also before justices itinerant for common pleas and pleas of the forest, and any other justices and ministers of Us and Our heirs, as well in the presence as in the absence of Us and Our heirs, make fines, or be amerced, forfeit issues, or that forfeitures and murder shall be adjudged against them, which fines, amerciaments, ransoms, issues, year day and waste or strip, forfeitures and murders, to Us and Our heirs would belong if they had not been granted to the said Duke and the other Dukes aforesaid, so that the same Duke and other Dukes aforesaid by themselves, or by their bailiffs and ministers may levy, perceive, and have such fines, amerciaments, issues, and forfeitures of such tenants, and all things which to Us and Our heirs might belong of the said year, day, and waste or strip and murders, without question or hindrance from Us and Our heirs, justices, escheators, sheriffs, coroners, and other bailiffs or ministers whatsoever: Also We have granted to the said Duke for Us and Our heirs, and by the charter have confirmed, that he and the first-begotten sons as aforesaid of him and his heirs, Kings of England, being Dukes of the same place and heirs apparent to the said kingdom of England, do have and hold all fees to the aforesaid castles, boroughs, towns, manors and honours, and other lands and tenements, whatsoever, which we gave to the said Duke by another charter, and caused to be annexed and united to the said duchy, in the said county of Cornwall, in any wise belonging, together with wards, marriages, reliefs, escheats, forfeitures, and other profits, issues, and emoluments whatsoever, which belong or shall belong to Us by reason of

those fees in the same county, or which We or Our heirs might and ought to perceive and have if the said fees had been retained in the hands of Us and Our heirs, as well from all and singular the tenants who now hold or who hereafter shall hold the said fees as from the tenants holding of the said fees within the said county whenever the same shall happen, notwithstanding Our prerogative, or that the tenants holding the said fees, or the tenants holding of the said fees may hold elsewhere of Us and of Our heirs, or of the crown or otherwise in chief, or in any other manner, without the said county or within. We have granted also to the said Duke for us and our heirs, that he perceive and have scutage and profit of scutage as well of the fees aforesaid as also of all other fees belonging to the said castles, manors, honors, lands and tenements which We have lately granted to the said Duke as being annexed and united to the said dukedom, as well without as within the said county of Cornwall, and also of the knights fees belonging to the earldom of Chester within our said kingdom of England, viz. 40 shillings de scuto, or more or less, as it should happen, that We or Our heirs levied and had de scuto as well of the first year of our reign, and of any other time since we took upon ourselves the government of Our kingdom as also in times future whilst he shall hold the said duchy, notwithstanding the said fees in the said first year or since have been in Our hands or in the hands of others, so as that We ought to have the scutage thereof, and notwithstanding that the said Duke may not hitherto have had or in future have his service in our wars, of Scotland or elsewhere by reason of which service he ought to receive such scutage. Wherefore we will and firmly command for Us and Our heirs, that the said Duke and other dukes of that place for the time being for ever have the fees aforesaid with the appurtenances and all other profits aforesaid, and also the liberties aforesaid and that they henceforth fully enjoy and use the said liberties and every of them, and that the said Duke as well in the said past time as henceforward as long as he shall hold the said duchy, do have and receive the scutage aforesaid and the profit thereof, is as aforesaid.

Witnesses, the venerable Fathers .J. Archbishop of Canterbury, Primate of all England; R. Bishop of Coventry and Lichfield; R. Bishop of Chichester, Our Chancellor; Hugh de Courteney, Earl of Devon; Henry de Beaumont, Earl of Bohun, William de Clynton, Earl of Huntingdon; William de Ros de Hamelak, Henry de Ferrar, John Darcy, steward of Our household, and others.

Given by Our hand at the Tower of London, the third day of January, in the 11th year of  
Our reign.

## The “Fordington” Charter

16 Edward III <sup>10</sup>

(9<sup>th</sup> July 1343)

For the Duke of Cornwall – The King to his Archbishops, Bishops, Abbots Priors Earls, Barons Justices, Sheriffs, Provosts, Ministers, and all Bailiffs and all his faithful subjects greeting. We consider it to be worthy and agreeable to reason that we who willingly show our hand profusely munificent to our beloved (subjects) also to foreigners, that we should grant with a certain abundance of more full munificence to our first born (Son), Edward Duke of Cornwall and Earl of Chester, who hath been born to us to the joy both of our subjects, the presage of lasting defence, and the strength and honor of our Royal House, considering, therefore, how the Earldom of Cornwall, now called the Duchy of Cornwall, hath sustained for a length of time a great dismemberment of its rights, and desiring to make integral (*redintegrare*) the said Duchy and re-collect its rights thus dispersed, in consideration of the premises we have given and granted for us and our heirs to the aforesaid Duke, the Manor of Little Weldon with its appurtenances, in the county of Northampton, the Manor of Fordington with the Hamlet of Whitewell, and other its appurtenances. in the County of Dorset, the Hamlet of Wyke Southteigne, with its appurtenances, in the County of Devon, and a certain tenement, with it appurtenances, in Shorman, in the county of Sussex, which were lately members and appurtenances of the said Earldom of Cornwall, now the Duchy of Cornwall, and which our beloved and faithful Hugh de Ardele, Earl of Gloucester, and Margaret his wife, now deceased, held for the life of the same Margaret, by the grant of Edward, lately King of England, our father, and which by the death of the same Margaret are now in our hand. We have given also and granted for us and our heirs to the aforesaid Duke The Town (William) de Rokynham with its appurtenances, in the County of Northampton, which is a member, and among the appurtenances of the said Duchy, and which came to our hands by the

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<sup>10</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall 1854-1856 Arbitration by Sir John Patteson Appendix L

death of John of Eltham, lately Earl of Cornwall, our most dear brother, who held the town aforesaid by our grant to have and to hold to the said Duke and his heirs, first born Sons of the Kings of England, hereditarily to succeed to the Kingdom of England, of us and our heirs for ever by the services therefore due and accustomed, as annexed and united to the said Duchy, together with the Knights' fees, advowsons of churches, and all other things to the aforesaid manors, towns, hamlets, tenements in anywise relating, in the same manner in which the aforesaid Duchy was granted to him by us. Wherefore we will and firmly command for us and our heirs, that the aforesaid Duke should have and hold the manors, towns, hamlets and tenements aforesaid, to the aforesaid Duke and his said heirs for ever as annexed and united to the aforesaid Duchy, together with the fees, advowsons, and ether their appurtenances aforesaid of us and our heirs as is aforesaid. These persons being witnesses, &c., &c.

Given under our hand at the 'Tower of London", the 9th day of July.

By Writ of Privy Seal.

# INSPEXIMUS CHARTER

of

**KING HENRY VII** <sup>11</sup>

**(30TH APRIL 1488)**

Henry by the grace of God King of England and France and Lord of Ireland, to all to whom the present letters shall come, Greeting. We have inspected the confirmatory Letters Patent of the Lord Edward IV, late King of England, in these words:

*[Here follows a recital of the Inspeximus charter of King Edward IV, reciting that of King Richard II, reciting that of King Edward III, reciting those of King John and Earl Richard;]*

Now we, considering the aforesaid charters and letters, and all and singular in them contained to be valid and agreeable, do accept and approve them for us and our heirs, as far as in us lies, and do now ratify and confirm them to our beloved burgesses of the said borough and their heirs and successors as the aforesaid letters reasonably bear witness and as the same burgesses and their ancestors have always hitherto reasonably used and enjoyed the said liberties and exemptions. In witness whereof we have caused these our letters to be made patent. Witness myself at Westminster the thirtieth day of April in the third year of our reign. shillings paid in Chancery. Examined by us, Richard Skypton and William Elyot, clerks. Bagot.

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<sup>11</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall 1854-1856 Arbitration by Sir John Patteson Appendix L



**Appendix D**

**The Cornish Stannary Charters**

**and**

**Resolutions of the Privy Council**



## **THE CORNISH STANNARY CHARTERS**

**Charter of Liberties to the Tinnars of Cornwall and Devon (1201)**

**Charter of Liberties to the Tinnars of Cornwall (1305)**

**Charter of Confirmation to the Tinnars of Cornwall (1402)**

**Grant or Patent of Pardon and Immunities to the Tinnars,  
Bounders, and Possessors of Works of Tin of Cornwall (1508)**

**Resolutions of the Judges in 1608**

**Resolutions of the Privy Council 1632**

**CHARTER OF LIBERTIES**  
**to the**  
**TINNERS OF CORNWALL AND DEVON**  
**3 JOHN<sup>1</sup>**  
**(1201)**

The King to the Archbishops, etc., greeting.... John, by the grace of God, King of England, etc., to the archbishops, bishops, abbots, earls, barons, judges, sheriffs, foresters, and to all our bailiffs and faithful people, greeting. Be it known that we have conceded that all tin miners of Cornwall and Devon are quit of all local pleas of the natives as long as they work for the profit of our farm or for the marks for our new tax; for the Stannaries are on our demesne. And they may dig for tin, and for turf for smelting it, at all times freely and peaceably without hindrance from any man, on the moors and in the fiefs of bishops, abbots, and earls, as they have been accustomed to do. And they may buy faggots to smelt the tin, without waste of forest, and they may divert streams for their work just as they have been accustomed to do by ancient usage. Nor shall they desist from their work by reason of any summons, except those of the chief warden of the Stannaries or his bailiffs. We have granted also that the chief warden of the Stannaries and his bailiffs have plenary power over the miners to do justice to them and to hold them to the law. And if it should happen that any of the miners ought to be seized and imprisoned for breach of the law they should be received in our prisons; and if any of them should become a fugitive or outlaw let his chattels be delivered to us by the hands of the warden of the Stannaries because the miners are of our farm and always in our power.

Moreover, we concede to our treasurer and the weighers, so that they might be more faithful and attentive to our service in guarding our treasure in market towns, that they shall be quit in all towns in which they stay of aids and tallages as long as they are in our service as treasurers and weighers; for they have and can have nothing else throughout the year for their services to us. Witnesses, etc.

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<sup>1</sup> Lewis, G. R *The Stannaries – A Study of the Medieval Tin Miners of Cornwall and Devon* (1908) p 238

**CHARTER of LIBERTIES**  
**to the**  
**TINNERS OF CORNWALL**  
**33 Edward I<sup>2</sup>**  
**(1305)**

“For the tinnars in Cornwall. - The King to the Archbishops, greeting. Know ye, that for the improvement of our Stannaries in the County of Cornwall and/or the tranquillity and advantage of our tinnars of the same, we have granted for us and for our heirs, that all the tinnars aforesaid working those Stannaries, which are our demesnes, whilst they work in the same Stannaries, shall be free and quit of pleas of natives, and of all pleas and suits in any wise touching the Court of us, or of our heirs, so that they shall not answer before any justices or ministers of us, or our heirs, of any plea or suit within the aforesaid Stannaries arising, unless before the custos of our Stannaries aforesaid, who for the time being shall be, excepting pleas of land, and of life, and of members, nor shall they depart from their works for the summons of any of the ministers of us, or of our heirs, unless by summons of our said custos; and they shall be quiet of all tallages, toll stallages, aids, and other customs whatsoever, in the towns, ports, fairs, and markets within the county aforesaid, for their own goods. We have granted also the said tinnars that they may dig tin, and turves to melt tin, anywhere in the lands, moors, and wastes of us, and of others whomsoever, in the county aforesaid, and divert water and water courses for the works of the Stannaries aforesaid, where and when it shall be necessary, and buy wood to melt the tin, as they have been accustomed, without hindrance of us, or of our heirs, bishops, abbots, priors, earls, barons, or others whomsoever, and that our custos aforesaid, or his deputy, shall hold all pleas between the tinnars aforesaid arising, and also arising between them and other strangers, for all trespassers, suits, and contracts, made in the places in which they work within the Stannaries aforesaid, and that the same custos shall have full power to judge the tinnars aforesaid, and other strangers, in such pleas, and to do justice to the parties, as shall be right and heretofore used in the same Stannaries; and if any of the tinnars aforesaid shall have transgressed in anything/or which they ought to be imprisoned, they shall be arrested by the custos aforesaid, and in our prison of

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<sup>2</sup> Concanen, *G A Report of the Trial at Bar Rowe v Brenton* (1830) Appendix L

Lostwythiel, and not elsewhere, shall he kept and detained until, according to law and the custom of our kingdom, they shall be delivered; and if any of the tinnars aforesaid, upon any fact within the county aforesaid, not touching the Stannaries aforesaid, shall put himself upon an inquisition of the county, one half of the jurors of such inquisition shall be of the tinnars aforesaid, and the other half of strangers. If concerning a fact wholly touching the Stannaries aforesaid, the inquisitions shall be made as they have heretofore been accustomed; and if any of the same tinner shall be fugitive or outlaw or shall have made any default for which he ought to lose his chattels, those chattels shall be appraised by the custos aforesaid, and our coroner of the county aforesaid, and by them at the next towns shall be delivered to answer thereupon to us and our heirs, before our justices itinerant in the county aforesaid. We will, moreover and firmly command that all the tin, as well white as black, wheresoever it shall be found and wrought in the county aforesaid, shall be weighed at Lostwythiel, Bodmynyan, Liskeret, Trevern, or Helleston, by our weights for this ordered and signed, upon forfeiture of all the tin aforesaid; and that the whole of the same tin shall be coined in the same towns every year before the custos aforesaid, before the day of St Michael, in September under forfeiture aforesaid. And we have granted for us, and for our heirs, that all our tinnars aforesaid may lawfully sell all their tin so weighed to whomsoever they will in the town aforesaid, by making to us and to our heirs the coinage and other customs due and used, unless we, or our heirs, shall buy: wherefore we will

and firmly command for us and for our heirs, that our tinnars at aforesaid shall have all the liberties, free customs, and acquittances above written, and that they, without hindrance or impediment of us, or of our heirs, justices, escheators, sheriffs, or other bailiffs or ministers, whomsoever the same shall reasonably enjoy inform aforesaid.

These being witnesses, the venerable fathers, W, Bishop of Coventry and Lichfield; S Bishop of Salisbury, J Bishop of Carlisle, Henry de Lacy Earl of Lincoln; Ralph de Monte Hermerio, Earl of Gloucester and Hertford: Humphrey de Bohun, Earl of Hereford and Essex; Adomar de Valence: Hugh le Dispenser: John de Hastings, and others. Given by our hand, at Westminster the 10th day of April. in the 33rd year of our reign.

## CHARTER OF CONFIRMATION

to the

### TINNERS OF CORNWALL

3 Henry IV<sup>3</sup>

(1402)

The King, to all to whom, etc., greeting. We have inspected letters-patent of the Lord Richard, late King of England, the second after the conquest, our predecessor, late made in these words - Richard, by the grace of God, King of England and France, and Lord of Ireland, to all to whom these our present letters shall come greeting, we have inspected letters-patent of the Lord Edward, King of England and, our grandfather, in these words - Edward, by the grace of God, King of England and France, and Lord of Ireland, to all to whom these present letters shall come greeting, it appears to us by the inspection of the rolls of our Chancery that we lately caused our charter, under the seal which we then used in England, to be made in these words - Edward, by the grace of God, King of England and France, and Lord of Ireland, to the archbishops, bishops, abbots, priors, earls, barons, justices, sheriffs, reeves, ministers, and to all his bailiffs and faithful people, greeting, it appears to us by inspection of the rolls of Chancery of the Lord Edward, late King of England, our grandfather, that the same, our grandfather, made his charter in these words - (*reciting the charter 33 Edward 1*) - We also grant of the same, our grandfather aforesaid, and all and singular in the charter aforesaid contained, holding firm and valid the same for us and our heirs as much as in us is at the request of Edward I of Cornwall, and Earl of Chester, our most dear son, to the stanners aforesaid, by the tenor of these presents, have granted, accepted, and confirmed as in the charter aforesaid, is reasonably accepted, and as the same stanners and their ancestors, and predecessors, the liberties aforesaid, from the time of the grant thereof by virtue of the charter aforesaid, have always heretofore been accustomed reasonably to use and enjoy. These being witnesses, the venerable father John, Archbishop of Canterbury, primate of all England; Simon, Bishop of Ely; Robert, Bishop of Chichester; John de Warren, Earl of Surrey and Sussex; Robert Parnyng, our chancellor; William de Cusance, our treasurer; Ralph de Stafford, steward of our household; and others. Given by the hand of the aforesaid Duke Guardian

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<sup>3</sup> Concanen, G., *A Report of the Trial at Bar Rowe v Brenton* (1830) Appendix L

of England, at Kenyngton, the nineteenth day of October, in the sixteenth year of our reign of England, and of France the third. We, moreover, the tenor of the charter aforesaid, under the seal which we now use in England, by the tenor of these presents, have caused to be exemplified in testimony whereof these our letters we have caused to be made patent. Witness myself at Westminster, the twenty-fourth day of January, in the eighteenth year of our reign of England, and of France the third. We moreover the grand wills and precepts aforesaid, and all and singular in the said letters contained, holding firm and valid the same for us and for our heirs, as much as in us is, do accept, approve, ratify, and to the aforementioned stanners, by the tenor of these presents, do grant and confirm, as the letters aforesaid reasonably witness, and as the same stanners and their predecessors, the liberties aforesaid, from the time of grant of the same, have always been accustomed to use and enjoy; in testimony whereof these our letters we have caused to be made patent. Witness myself at Westminster, the, first day of July, in the eighteenth year of our reign. We more over the grants, wills, and precepts aforesaid, and all and singular in the said letters contained, holding firm and valid the same for us and for our heirs, as much as in us is, to the aforementioned stanners, by the tenor of these presents do grant and confirm as the letters aforesaid reasonably witness, and as the same stanners and their predecessors, the liberties aforesaid reasonably witness, from the time of the grant of the same, have been accustomed reasonably to use and enjoy: in testimony whereof these our letters we have caused to be made patent. Witness myself at Westminster, the nineteenth day of May.

**GRANT or PATENT OF PARDON AND IMMUNITIES  
TO THE  
TINNERS, BOUNDERS AND POSSESSORS OF WORKS OF TIN OF  
CORNWALL**

**Anno 23 Henry VII<sup>4</sup>**

**(1508)**

The King to all to whom, &c., greeting. Know ye, that we of our special grace, and of our certain knowledge and mere motion, have pardoned, remised and released, and by these presents do pardon, remise, and release, to Robert Willoughby, Lord de Broke, John Mowne, of Hall, in the County of Cornwall, Esq., (and then follow about 1500 names,)

and to every of them, otherwise called tanners, bounders, or possessors of works of tin, and to the bounder or possessor of any tinwork in the County of Cornwall, who have not or hath not introduced the names of new possessors, or a new possessor of any tinwork newly bounded, with the names of the works, in the next Court of Stannary after the bounding aforesaid, showing the names or name of the possessors or possessor of the same works or work, of tin, with the metes and bounds of the said works or work as well in length as in breadth, to the possessors or possessor of any houses or house, called blowing houses or a blowing house, in the County of Cornwall, who have not or hath not introduced the number of all and singular the pieces of tin in the Exchequer at Lostwithiel, yearly, at the time of every coinage, with the names or name of all and singular the possessors or possessor of the same houses or house, called blowing-houses or a blowing house, with the names or name of all and singular the blowers or workers, blower or worker of the same pieces or parcels of tin blown or wrought in the same houses or house, called blowing houses or blowing house, at the time of the coinage there, to the tanners or tinner, buyers or buyer of black or white tin, and to the makers or maker of white tin, who have not or hath not introduced the marks or mark of the possessors or possessor of the said tin, in the said Exchequer at Lostwithiel, to be impressed, put, or written in a certain book of signatures or marks, being in the said Exchequer, before the same possessors or possessor shall sign the said tin with the said mark to the tanners or buyers, tinner or buyer of black or white tin, to the changers or

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<sup>4</sup> Concanen, G *A Report of the Trial at Bar Rowe v Brenton* (1830) Appendix L

changer of the marks or mark of any possessors or possessor so impressed, put or written to the said book of marks, being in the said Exchequer, to the tanners or buyers, tanner or buyer of black tin, to the blowers or workers, blower or worker of false or hard tin, as well with the letter H; as without the letter H; and to the blowers or workers, blower or worker of white tin from their own black tin,

and to every of them, by whatsoever other means or additions of names or occupations they or any of them are or may be known — all transgressions, contempts, impeachments, forfeitures, concealments, fines, pains, imprisonments, amerciements, debts, and losses adjudged or to be adjudged, abuses, retentions, and offences, against the form of any statutes, ordinances, provisions, restrictions, or proclamations, by us or by our progenitors, &c., whatsoever authority before this time made, &c. (*This charter then proceeds to the following effect*) — that no statutes, acts, &c., hereafter issuing, to be made within the county aforesaid nor without, to the prejudice or exoneration of the same tanners, workers of black and white tin, &c., or of any persons or person whomsoever meddling with any black or white tin in the county aforesaid, their heirs, or successors, &c., unless there be first thereunto called twenty and four good and lawful men, from the four Stannaries within the County of Cornwall, to be elected, &c.

So that no statute, ordinance, provision or proclamation, hereafter to be made by us, our heirs or successors, or by the aforesaid Prince of Wales, Duke of Cornwall for the time being, or by our council, or the council of our said heirs or successors, or of the said Prince, be made, unless with the assent and consent of the aforesaid twenty and four men, so to be elected and named, &c., and the parties aforesaid, their heirs, &c., shall be hereafter otherwise charged, &c., towards us, our heirs or successors, with any customs, subsidies, or licenses of any tin issuing out of this our Kingdom of England, unless only as other merchants in the same county may be charged, &c., towards us, or have been towards our progenitors, in time of which memory is not, within our ports of London and Southampton, for any customs, subsidies, or licenses of tin issuing Out of this our Kingdom of England; but we will, &c., that the aforesaid Robert, John, &c., and every of them, merchants of tin, and all other buyers, venders, &c. shall be exonerated, &c., by these presents, from all new impositions, &c., so that the said Robert, John, &c., shall not hereafter be charged in any manner for any customs, &c., of tin out of this our kingdom



of England, unless as other native buyers, venders, and merchants are charged, or any native merchant is or hath been charged, towards us and our progenitors, within our said ports of London and Southampton aforesaid; and further, that all pardons, &c., by us pardoned, &c., to the aforesaid Robert, John, &c., and to all other offenders or offender, breakers or breaker, of any statutes, ordinances, proclamations, or provisions, made, edited, or ordained by us or our progenitors, &c., touching any tinnars, bounders, possessors, blowers, workers, buyers, venders, merchants of tin, or any other meddling with tin as aforesaid, may and shall be in our next Parliament, &c., authorised; and that all grants by us granted, and all annullings of all statutes, acts, &c., aforesaid, by our grants aforesaid annulled, at the petition and request of the said Robert, John, &c., shall be confirmed in the said Parliament, that as well the same Robert, John, &c., may enjoy all our said grants and annullings, so that all statutes, &c., before made, shall be revoked, annulled, and made void, according to the advice and council of the advisers or adviser of the aforesaid Robert, John, &c., to their best profit and greatest advantage as to them shall seem best to be done, &c.

And further, &c., we have granted, &c., to the aforesaid Robert, John, &c., that no supervision of our customs and subsidies in our County of Cornwall aforesaid, nor any searcher of the same customs and subsidies in the said county, from henceforth and hereafter, shall take for the weighing of any tin issuing out of this our kingdom of England, for his fee, by reason of the weighing of the same tin, so issuing out of our kingdom of England aforesaid, only the same as is given to him, and to all other weighers, by a certain statute, edited in the Parliament of the Lord Edward, late King of England the Third, our progenitor, holden in the fourteenth year of his reign, (that is to say) for every weight of forty pounds, one farthing; and from the weight of forty pounds unto the weight of one hundred pounds, one halfpenny; and for every weight of one hundred pounds, unto the weight of a thousand pounds, one penny, and no more, as in the said statute more fully appears.

And further, we grant that every weighers of tin, in our town of Southampton, for the time being, shall take from every merchant of tin in our County of Cornwall, for the weighing of his tin, brought or hereafter to be brought into our town of Southampton, the same as is given to him by the said statute, and no more.

In witness whereof &c., Witness the King at Westminster, the twelfth day of July, in the twenty-third year of the reign of King Henry the Seventh. By writ of privy-seal, and of the date, &c. “.

## **Resolution of the Judges in 1608<sup>5</sup>**

The Resolution of all the Judges by force of his Majestyes letters concernyng the stannaries in Devon and Cornwall, upon the hearing of the Councell learned of both partyes at severall dayes and what could be alledged and shewed on either party and upon viewe and hearing of the former proceedings in the Courts of the Stannarie, both before and since a certaine Act of Parliament made concernyng the Stannaries in quinquagesimo Edwardi tercii vicesimo sexto Novembris, millesimo sexcentesimo octavo at Serjeants Inne.

First we are of opynion that as well Blowers as all other Laborers and workers without fraud or covyn in or about the Stannaries in Cornwall and Devon are to have the priviledge of the Stannaries duryng the tyme that they doe worke there. Secondly, that all matters and things concernyng the Stannaries or depending upon the same are to be heard and determynd in those Courts according to the custome of the same, tyme out of mynd of man used. Thirdly, that all transitory accions betweene Tynner and Tynner or worker and worker (though the case be collaterall and not perteyning to the Stannarie) maye be heard and determynd within the Courts of the Stannaries according to the Custome of the said Courts, albeit the cause of accion did rise in any place out of the Stannaries, if the defendant be found within the Stannarie, or may be sued at the Common Lawe at the election of the Plaintife, but if the one party only be a tynner or worker, and the cause of accion being transitorye and collateral to the stannarie doe rise out of the said stannaries, then the Defendant maye by the custome and usage of those courts plead to the jurisdiction of the Court that the cause of accion did rise out of the Stannaries and the Jurisdiccio of those courts which by the custome of the Court he ought to plead in proper person upon oath. And if such plea to the Jurisdiccio be not allowed, then a prohibicion in that case is to be graunted, and if in that case the defendant doe come to pleade to the Jurisdiccio of the Court upon his oath, he ought not to be arrested eundo

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<sup>5</sup> Lewis, G. R *The Stannaries – A Study of the Medieval Tin Miners of Cornwall and Devon* (1908) p 245

redeundo vel morando, at the suite of any subject, in anye Corporacion or other place where the said Courts of the Stannerie shalbe then holden.

Fourthly, if the Defendant maye plead to the Jurisdiccion of the Court in the case before mencioned and will not but plead and admitt the Jurisdiccion of the Court and Judgment is given and the body of the defendant taken in execucion, the Party cannot by Lawe have any accion of false imprisonment, but the execucion is good by the custome of that Court; but if in that case it doth appeare by the Plaintife's owne shewing that the contract or cause of accion was made or did rise out of the Stanneries and the Jurisdiccion of those Courts or if it appeare by the condicion of the bond whereupon the accion is grounded that the condicion was to be performed in any place out of the Jurisdiccion of those Courts then all the proceedings in such cases upon such matter apparant are coram non Iudice.

Fifthly, We are of opynion that noe man ought to demurre in that Court for want of forme, but only for substance of matter, as if an accion be brought there for words which will beare no accion or an accion of debt upon a contract against executors or admynistrators or such like. In such cases a Demurrer maye be upon the matter and that the proceedings there must be according to the custome of those courtes used tyme out of mynd of man for that noe writt of error doth lye upon any Judgment given there but the remedy given to the party grieved is by appeale as hath byn tyme out of mynd of man accustomed.

Sixthly, that the Courts of the Stannary have not any Jurisdiccion for any cause of accion that is locall rising out of the stannary.

Seventhly, that the Priviledge of the workers in the Stannaries do not extend to any cause of accion that is locall rising out of the Stannaries nor for any cause locall rising within the Stannaries whereby any Freehold shall bedemaunded, for that makers of life, member, and Plea of Land are excepted by expresse words in their charters and noe man can be ex empt from Justice.

Thos: Fleming.            Edw: Coke.

Close Roll, 6 James I, pt. v.

## **Resolutions of the Privy Council, 1632<sup>6</sup>**

*(Order of January 2 1632.)*

Whereas an humble petition was heretofore presented to his Majestie by the Earle of Pembroke and Montgomery, Lord Warden of the Stanaries concerning the jurisdiction and priviledges of the said Staneries and by his command sent to the Lords Cheife Justices of both Benches with the rest of his Majesties justices there, to be by them perused, and considered, to the end some course might be settled for the distinguishing, regulateing and ordering of the limitts and priviledges of the seuerall Jurisdictions of the said Courts, that his Majesties Subjects might the better know whether they were to resort for the Administracion of Justice, and the heareing of their causes, and righting of their wrongs. Upon a long heareing and debate of this business (his Majestie then sitting in Councell) and the said Judges being present, as also his Majesties Attorney generall. It was resolved, and ordered that the said Judges should search out and peruse such Statutes, and other Records as might concerne that business And also that Mr. Attorney should doe the like, and conferr with the said judges for the cleareing of the jurisdiction of the said Staneries, that so if they could not reconcile and accommodate the differences aforesaid among themselues, then before, or at the longest on the 18th of February next, they should attend his Majestie and make Report of the state of the cause, to the end that his Majestie may thereupon settle such a final conclusion therein, as in his princely wisdom shall be fitt.

*(February 18, 1632)*

This day (his Majestie being present in Councell) certaine Articles and Propositions produced by his Majesties Attorney generall concerning the Jurisdiction of the Stannaries, were read and approued of by the Board; only some fewe particulars thought fitt to be added were by his Majestie recomended to his said Attorney generall; who is likewise required to cause a faire transcript thereof to be signed by the Judges, before they goe theire Circuite and to retourne the same to this Board, to the end it may be kept in the Councell chest.

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<sup>6</sup> Lewis, G. R *The Stannaries – A Study of the Medieval Tin Miners of Cornwall and Devon* (1908) p 249

The Rules following to be observed in his Majesties Courts at Westminster and his Court of the Stanneries were agreed of before the Board, his Majestie being present in Councell and afterwards subsignd by the Lord Warden of the Stanneries and all the Judges of his Majesties said Courts at Westminster and his Attorney Generall. And the Transcript thereof ordered to be entered into the Register of Councell Causes and the originall to remayne in the Councell chest.

The Workers about the Tynne, whether in Myne or Streame. the Carrier, Washer, and Blower of Tynne, and the necessarie Attendants aboute the workes have priviledge that they ought not to be sued out of the Stannery (except it be in causes concerning Life, Member, or Freehould) for any cause aryseing within the Stannerie. And if they be sued elsewhere the warden may demand Conusans or the partie may plead his priviledge.

Besides theise there are other Tynriers that doe noe handworke as are the owners of the Soyle, owners of the Bounds, owners of the Bloweing houses, and theire partners, buyers and sellers of Black Tynne, or Whyte Tynne before the deliuerance, theise may sue one an other, or working Tynners, or any other man, for any matter concerning Tynne, or Tynne works, in the Stannerie Courte.

Both theise Tynners and the workers may sue one an other in the Stannarye for all causes personall not concerning Freehold, Life or Mem ber, arising within the Stannary or elsewhere aryseing.

One Tynner may sue a Forrayner in all lyke causes personall, aryseing within the Stannarye, but a Tynner may not sue a Forrayner, in the Stannarye for matters personall aryseing out of the Stannarye.

Of those later sorte of Tynners, such onely are intended as within some convenient tyme, make profitt or endeavour to make profitt to the Coynage.

For the manner of tryeing whether one be a Tynner or not, the use in Cornwall is by Plea, and if issue be joyned, and found for the Plaintiffe it is not peremptory but a respondes.

In Devon it is by the oath of the partye.

*For the Extent of the Stannaries.*

We cannot yet discern but that the Stannaries doe extend over the whole County of Cornwall.

In Devon there hath bin long Question concerning the extent of the Stannarie, as apeareth in sunderie Petitions in Parliament.

This is question of Fact and not of Lawe.

But for repose and quiettnes hereafter, whether it be convenient to award a Commission to some able persons who may enquire by oath of lawfull and indifferent men of the Bounds of each Stannarve for informacion onely, or whether it be more fitt to leave it without further enquirie and as it bath byn heretofore wee humbly leave it to your Majesties wisdomes, with this; that untill the matter of fact be further knowne, this Question concerning the Bounds of the Stannarye in the County of Devon may remayne without prejudice, by occasion of any former opinion delivered concerning this question of facte. But

The exempcion of Tynners from Toll is over the whole county.

The power to digg and search for Tynne is over the whole county saueing under houses, orchards, gardens, etc.

The Tynne wrought in any parte of the county must be brought to the Coynage.

The priviledge of Empcion or preempcion is of Tynne gotten over the whole county.

Judgements had in the Stannarye Courte are Leaviable in all parts of the county.

Fynes and Amerciaments sett in the Stannary Courte may be leavied over the whole county by Proces of the Stannarie.

For trespasses in Tynne works, Proces may be executed in the whole county.

Water Courses for the Tynne works on Tynne Mills may be made in any place of the countye.

Register of the Privy Council, Charles 1, vol. 8, pp. 412, 457, 485, 486. (Printed with omissions in Harrison's Report on the Jurisdiction of the Stannaries, pp. 158—160)

**APPENDIX E**

**CORNWALL AND PALATINE COUNTIES**



## Cornwall and Palatine Counties

***“Cornwall called a county palatine..Not in truth one...because it wanted the principal part viz an exclusive jurisdiction.”<sup>1</sup>***

### A Introduction

It is not uncommon to see comparisons made between Cornwall and Palatine Counties. Indeed Deacon described the Duchy of Cornwall as: “an attenuated rump of palatine status”<sup>2</sup>. In the dispute with the Crown regarding the right to the foreshore of Cornwall the Duchy, while acknowledging Cornwall was not a Palatine County, was anxious to demonstrate it enjoyed many of the same rights. Reference is made to the granting of Charters by the Duchy of Cornwall and the fact the procedure was similar to those granted by Palatine Earls. Furthermore, the Duchy pointed out, Cornwall was classed with counties undoubtedly palatine in the Escheators Act 1509. It was claimed on behalf of the Duchy that Cornwall:

“...was held by the Earls of Cornwall with the rights and prerogatives of a County Palatine as far as regards Seignory or territorial dominion.”<sup>3</sup>

The Crown vigorously disputed the claims of the Duchy to which the Duchy responded:

“It is not contended that Cornwall was a County Palatine but that it was held with several rights similar to those enjoyed by a Palatine Lord.”<sup>4</sup>

The questions which arise are what are Palatine Counties? What special rights did they enjoy? In what way was Cornwall similar or different from Palatine Counties? What extra weight was added to the claims of the Duchy in comparing the Duchy with Palatine Counties?

A remarkable number of counties have claimed or have had claimed on their behalf the status of a Palatine County including Kent, Lancaster, Chester, Durham, Pembroke, the Isle of Ely and Hexham and Hexhamshire (a county which probably originated as one of

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<sup>1</sup> Hale, Sir Matthew, *The Prerogatives of the King* (1976) p221

<sup>2</sup> Deacon, B., *Cornwall- A Concise History* (2007) p38

<sup>3</sup> Tidal Estuaries, Foreshore and Under-Sea Minerals within and around the Coast of the County of Cornwall 1854-1856. Arbitration by Sir John Patteson (1855) Duchy Preliminary Statement p 7

<sup>4</sup> *Ibid* Duchy Preliminary Statement p 10

the districts of the Kingdom of Northumbria then being the seat of a bishopric. It later lost its privileges, and became considered part of County Durham)<sup>5</sup>. The three best known and most significant are Durham, Chester and Lancaster. The focus of this Appendix will be on Chester and Lancaster. The reasons being, firstly, the Earldom of Chester, like the Principality of Wales, became and is now one of the titles traditionally granted to male heirs to the throne including the present one. Secondly, because the Palatine County of Lancaster, which is part of but is not the same as the Duchy of Lancaster, still exists and shares many of the characteristics of the Duchy of Cornwall. It is a substantial organisation which is not surrendered with the other “Hereditary Revenues” of the Crown. Like the Duchy of Cornwall it is also called a “private estate” both by the Crown and Government. The Duchy of Lancaster was brought into being by that remarkable innovator Edward III in 1351.

### *B The Origin of Palatine Counties*

There is much controversy over the origin, definition and status of Palatine Counties during the Norman and Angevin periods<sup>6</sup>. It was once argued that Palatine Counties were created during the reign of the Conqueror. Kent was said to have been a Palatinate under William I's half brother Odo of Bayeaux. Attempts have also been made to demonstrate Gloucestershire and Worcestershire were Palatinates during the immediate Post Conquest period. It is true that the Conqueror:

“...with newly won territory to hold, which was under recurrent threat of invasion, had every reason to place wide emergency powers and ample resources in the hands of lieutenants who guarded his frontiers. But such positions were not so exceptional as once thought. They are found not merely on the Welsh border and in the north, but also in East Anglia and along the coastline of southern England from Kent and Sussex through Hampshire and the Isle of Wight to Cornwall...”<sup>7</sup>

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<sup>5</sup> Hale, Sir Matthew, *The Prerogatives of the King* (1976) p 214

<sup>6</sup> Alexander, J., “New Evidence on the Palatinate of Chester” (Oct 1970) *The English Historical Review* Vol. 85 No 337p 716

<sup>7</sup> Barraclough, Geoffrey, “The Earldom and County Palatine of Chester” (1951) *Transactions of the Historical Society of Lancashire and Cheshire* Vol CIII p 28

But the idea that Palatinates came into being during that period has now been rejected<sup>8</sup>. There is, it is argued, confusion between the personal power of the individual Earls and their legal-constitutional status. Professor Otway-Ruthven suggested that during the twelfth and thirteenth centuries Chester, for example, shared more in common with “marcher lordships”, a geographical rather than institutional term, who had rights and privileges held as well by the Anglo-Norman earls of Chester, than with Durham. Indeed Professor Otway-Ruthven suggested the marcher lordships were even more autonomous of the Crown than was Cheshire<sup>9</sup>. The common law, for example, did not run in the marches as it did in Cheshire<sup>10</sup>. The debate is fascinating but outside the scope of this work. It is now largely accepted it is: “futile to use the term palatinate before the reign of Henry II (1154 – 1189)”<sup>11</sup>.

Dr. Somerville says:

“A county palatine was one in which the king transferred most of his royal powers to the subject who possessed the county. This measure of devolution was of particular advantage in the border counties, which might at any time be involved in raids, if nothing more, from warlike and predatory peoples on the other side of the line. Thus Chester faced the Welsh, and in the North Durham, and, for a time Hexhamshire, the Scots.”<sup>12</sup>

Others are less certain, for example Jean Scammell states:

“... (Lancaster) (Durham) and (Chester) had no common principle, no identity of origin or particular privilege to create or justify a peculiar status.”<sup>13</sup>

She went on to say that “an English palatinate was indeed in its beginning a term of pretension and not of definition”<sup>14</sup>. She argued that the term “palatinate” had no specific meaning as late as 1377 when John of Gaunt asked for an explanation for his Palatine

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<sup>8</sup> Alexander, op. cit. p 717

<sup>9</sup> Otway-Ruthven, A J., “The Constitutional Position of the Great Lordships of South Wales” (1958) *Transactions of the Royal Historical Society* 5<sup>th</sup> series viii p 5

<sup>10</sup> Alexander, op. cit. p 720

<sup>11</sup> Painter, Sidney, *Studies in the History of the English Feudal Barony*. (1943) p15.

<sup>12</sup> Somerville, R., “The Duchy and County Palatine of Lancaster” (1952) *Transactions of the Historical Society of Lancashire and Cheshire* Vol 103 p 59

<sup>13</sup> Scammell, Jean, “The Origin and Limitations of the Liberty of Durham” (1966) *The English Historical Review* Vol 81 part 320 p 450

<sup>14</sup> *Ibid* p 451

County of Lancaster. Others, however, take a different view suggesting in the late fourteenth century palatinates had a clearly understood meaning<sup>15</sup>.

Possibly the best summary of the way in which Palatine Counties came into being was set out in Barraclough's article of 1951 in which he says:

“From Henry II's time onward honour after honour disintegrated, and all that remained was a “shadowy collection of feudal superiorities”. But the few that “contrived to weather the storm” adapted themselves, almost of necessity, to the new situation, changing their character and feeding “upon the new process of government”; for against a monarchy conscious of new powers and striding ahead, to mark time was to go under. It was in these circumstances, in Chester as in Durham, that what was later called “palatinate” came into being. As the supremacy of the crown was defined and asserted, so the earl (of Chester) applied to himself “the new principles of sovereignty”, until eventually his rights might be defined as a regality equivalent to but under the king.”<sup>16</sup>

Lapsley in his definitive work on the County Palatine of Durham regards the word “Palatine” as entirely exotic until the thirteenth century<sup>17</sup>. The term “Palatine County” was used by Matthew Paris and later Bracton<sup>18</sup> in the middle of the thirteenth century. Its first appearance in a quasi legal record is Bracton's notes on proceedings concerning the divisibility of the earldom of Chester in 1238. Official sources do not denominate Chester as palatine until 1297<sup>19</sup>. The term was first used in connection with Durham, four years before in 1293<sup>20</sup>. It is also used in a Cheshire Plea Roll for 1310 in connection with a common right of liberties. It is probable that the *Quo Warranto* proceedings following the passing of the Quo Warranto Act 1290, which required a person to demonstrate by what authority they exercised some right or power, provided a powerful stimulus for franchise

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<sup>15</sup> Alexander, J., “The English Palatinates and Edward I” (1983) *Journal of British Studies* Vol 22 pt 2 p2

<sup>16</sup> Barraclough, op. cit. p 35

<sup>17</sup> Lapsley, G T., *The County Palatine of Durham* (1900) as quoted by Tout, Margaret *Comitatus Pallacii* (1920) *The English Historical Review* Vol 35, No 139 pp 418-419

<sup>18</sup> Tout, Margaret, “Comitatus Pallacii” (1920) *The English Historical Review* Vol 35, No 139 pp 418-419 who quotes from Bracton's *De Legibus* ii 290 and Matthew Paris' *Chronica Maiora* iii pp 337-338

<sup>19</sup> Record Commission *Placita de Quo Warranto* (1818) p 714

<sup>20</sup> Clayton, Dorothy, *The Administration of the County Palatine of Chester 1442 – 1485* (1990) p 48 See also Tout, Margaret “Comitatus Pallacii” (1920) *The English Historical Review* Vol 35, No 139 pp 418-419 who quotes from Bracton's Note-book no 1273 p 282

holders to review their positions hence the references which began to appear at this time<sup>21</sup>. The lawyers of Edward I attacked and reduced franchises and franchise holders were forced to redefine and reformulate their rights and privileges and put them on a broad foundation<sup>22</sup>.

Unlike the County Palatine of Lancaster there is no express grant of palatine status to either Chester, Durham or Pembrokeshire. Their title rested on “royal acquiescence in steadily advancing prescription.”<sup>23</sup> By contrast Bracton maintained that since “Time does not run against the King”<sup>24</sup> prescription could not give rise to a liberty only a written grant is a good warrant in his eyes<sup>25</sup>.

It is clear that the claims that palatinates originated with the Conqueror cannot be sustained and they emerged only much later. From the twelfth century came to be accepted as having a distinct legal personality though their precise characteristics are still debated. It also became apparent that palatinates differed one from another.

### *C The Characteristics and Definitions of Counties Palatine*

Somerville says: “A county palatine was one in which the king transferred most of his royal powers to the subject who possessed the county”<sup>26</sup>. This clearly leaves a lot of questions unanswered. What royal powers exactly? Could they be exercised autonomously or did the king exercise oversight? Others have defined palatine counties as those: “exempt or almost so from royal jurisdiction”<sup>27</sup> a description which does not takes us much further forward. They have also been described as: “...the exercise of regality by one who was not king”<sup>28</sup>. Holdsworth described palatinates as: “independent principalities of the continental type within which the king’s writ did not run – small models, as Bacon said, of the great governments of kingdoms”<sup>29</sup>. Later Holdsworth somewhat modified his view. He says: “The essence of a palatine earldom was that in the

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<sup>21</sup> Scammell, op. cit. page 451

<sup>22</sup> Barraclough, op. cit. p 38

<sup>23</sup> Cam, Helen, “The Evolution of the Mediaeval English Franchise” (1957) *Speculum* Vol 32 pt 3 p 435

<sup>24</sup> *Nullum tempus occurrit regi*

<sup>25</sup> Quoted in Cam: *Ibid* p 440

<sup>26</sup> Somerville, R., “The Duchy and County Palatine of Lancaster” (1952) *Transactions of the Historical Society of Lancashire and Cheshire* Vol 103 p 59

<sup>27</sup> Plucknett, T F.T., *A Concise History of the Common Law* (5<sup>th</sup> Edition) (1940) pp 99, 160

<sup>28</sup> Alexander, J., “The English Palatinates and Edward I” op. cit. p 2

<sup>29</sup> Holdsworth, Sir William S., *A History of English Law* (7th Edition revised 1956 by A L Goodhart) 1.109

county concerned the earl wielded all the king's powers as his deputy." He also said: "...they are bound both by acts of parliament and by the common law". Bishop Stubbs said they were: "earldoms in which the earls were endowed with the superiority of whole counties" and "regalia or royal rights of jurisdiction were exercised by the earls"<sup>30</sup>.

Lord Coke, in his 4<sup>th</sup> Institute published in 1644<sup>31</sup> describes a County Palatine in the following terms:

"It is called a *comitatus palatinus*, a county palatine....because the owner thereof, be he duke or earl etc hath in that county *jura regalia*<sup>32</sup> as fully as the King had in his palace...The power and authority of those that had counties palatine was kinglike, for they might pardon treasons, murders, felonies and outlawries thereupon. They might also make justices of eire, justices of assize, of gaol delivery, and of peace; and all original and judicial writs, and all manner of indictments of treason and felony, and the process thereupon, were made in the name of the persons having such county palatine; and in every writ and indictment within any county palatine it was supposed to be *contra pacem*<sup>33</sup> of him that had county palatine."

Lord Coke's description, even though written in the seventeenth century, did not correspond with reality. The County Palatine of Lancaster specifically did not have the right to pardon treasons and murderers.

In the seventeenth century Sir Matthew Hale stated that:

"The jurisdiction of a county included almost all other royal jurisdictions and liberties, and therefore is called *regale* (a prerogative of royalty) and *regalis potestas* (royal power). And indeed a county palatine hath a confluence of all other liberties and regalities under whose subordination before expressed to the supreme royal power."<sup>34</sup>

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<sup>30</sup> Stubbs, William, *The Constitutional History of England* (3<sup>rd</sup> edition) (1880) 1.271, 392

<sup>31</sup> Lord Coke *Fourth Institute* (1644) p 204

<sup>32</sup> Rights which belong to the Crown

<sup>33</sup> Against the peace

<sup>34</sup> Hale, op. cit. p 210 - 212

Blackstone writing in the nineteenth century found “earl’s palatine held *jura regalia* as fully as the king”<sup>35</sup>.

While considering the claims about the nature of the powers of the palatinates it should be understood that kings were always jealous of their power. In connection with the palatinate of Durham, for example, Edward I was perfectly prepared to sequester the palatinate whenever it so pleased the royal will<sup>36</sup>. He stated:

“...For the royal authority extends through the whole realm, both within the liberties and without”

Sir Matthew Hale emphasised: “..the king doth not grant franchise against himself”<sup>37</sup>. Post Gaines in 1964 wrote in connection with Chester:

“..it was a delegation of the royal jurisdiction for the administration of justice in part of the realm, and the earl remained subject ultimately to the king’s power and the right to do justice and maintain peace”<sup>38</sup>.

The Statute of Westminster of 1275 stated:

“..even where the king’s writ does not run, the king is sovereign lord over all and will do right to any who complain to him if the lord of the liberty be remiss.”<sup>39</sup>

Most strikingly Alexander asserted:

“...monarchs never hesitated to treat palatinates like any other part of the realm when necessity demanded; whatever may have been the pretended rights of the palatinates, the kings were not inhibited in their own rule by these formalities. Sovereignty was in fact inalienable..... There was but one king in England.”<sup>40</sup>

In simple terms at the local and practical level what distinguished palatinates from other counties within England and Wales?

By a Charter dated 28<sup>th</sup> February 1377 the county of Lancaster, as part of the Duchy of Lancaster, was made a County Palatine “as freely as the Earl of Chester enjoyed in his

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<sup>35</sup> Blackstone, Sir William, *Commentaries on the Laws of England* (9<sup>th</sup> Ed 1976) p 113

<sup>36</sup> Alexander, J., “The English Palatinates and Edward I” op. cit. p 10

<sup>37</sup> Hale, op. cit. p 204

<sup>38</sup> Post, Gaines, *Studies in Medieval Legal Thought* (1964) p 280

<sup>39</sup> Rothwell, Harry, *English Historical Documents 1189-1327* (1975) pp 401-402

<sup>40</sup> Alexander, James, “The English Palatinates and Edward I” op. cit. p 22

county of Chester”<sup>41</sup>. It therefore seems sensible to start by considering the Palatine County of Chester since supposedly it provided the exemplar for Lancaster.

The palatinate of Chester arose by “prescription” - there is no founding Charter as with the palatinate of Lancashire. Cheshire was not represented in the Westminster Parliament until 1543 and as a consequence claimed exemption from taxation imposed by Parliament. As far back as the reign of Edward I the king appeared to “request” rather than “demand” the payment of taxes voted by the national parliament<sup>42</sup>. Cheshire also enjoyed its own exchequer and chancery and register of writs and the privilege of return of writs. It should be noted, however, “..even a liberty with return of writs is nevertheless a place where the king’s writ runs”<sup>43</sup>. More specifically Cheshire would seem to have been fiscally independent since it does not appear on the Pipe Rolls save when the Earl was a minor in the king’s wardship. This absence, however, was not limited to palatinates, Cornwall was also absent from the Pipe Rolls<sup>44</sup>. It would appear the Cheshire barons were free from obligation to serve outside their county<sup>45</sup> though this was not unique to Cheshire: the Barons of Durham and the Marches enjoyed a similar privilege<sup>46</sup>. This benefit had become meaningless, in any event, by the end of Edward I’s reign when armies were no longer raised by calling on the service of tenants by knights-service<sup>47</sup>. It is the case the Barons in Cheshire held of the earl and not of the king.

The Earl of Chester declared he had “pleas of the sword” in his court.<sup>48</sup> For Lucian the monk writing about 1195:

“Chester was a province...with privileges which it distinguished from the rest of England...it attends rather to the sword of its prince than to the royal crown..”<sup>49</sup>

It is suggested “pleas of the sword” indicated that the Earl’s rights had been acquired by conquest and could not be removed by any king<sup>50</sup>.

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<sup>41</sup> Hardy, Sir William, *The Charters of the Duchy of Lancaster* (1845) p 32

<sup>42</sup> Clayton, op. cit. p 47

<sup>43</sup> Plucknett, T. F.T., *The Legislation of Edward I* (1949) p 30

<sup>44</sup> Painter, Sidney, *Studies in the History of the English Feudal Barony* (1943) p 112

<sup>45</sup> Barraclough, op. cit. p 36

<sup>46</sup> Alexander, J., “New evidence on the Palatinate of Chester” op. cit. p 723

<sup>47</sup> Booth, P. H. W., *The financial administration of the lordship and county of Chester 1272 – 1377* (1981) p 6

<sup>48</sup> Cam, op. cit. p 435

<sup>49</sup> Taylor, M. V., (Ed) “Liber Luciani de laude Cestrie” (1912) *Record Society Lancashire and Chester* Vol LXIV pp 9, 77



Royal authority in Cheshire was exercised through the mediacy of the earl. Most significantly the earl or his officials presided over the county courts; itinerant justices were excluded, writs ran in the earl's name; and the Sheriff was appointed by the earl and was not a royal official. Again these features were not unique to Cheshire they were also true of the marches<sup>51</sup>. The law they enforced, however, was statute and common law. Because Cheshire was not represented in Westminster did not mean they were not bound by the laws passed by that body.

A Charter of 1351 created Henry de Grosmont Duke of Lancaster of the palatinate of Lancaster. The gift bestowed on Henry his own writs, chancellor, chancery and seal. He was granted his own justices to try pleas of the Crown as well as other pleas under common law. At the same time it reserved certain taxes and subsidies to the crown. Most importantly, in contrast to Durham and Cheshire, it retained for the crown the right to pardon life and limb (that such judgement was taken by Bracton and Blackstone to be the benchmark of a palatinate<sup>52</sup>) and the right to correct errors in the palatinate court. Unlike Cheshire and Durham Lancashire was required to send representatives to Parliament. Taxes were collected by the ducal officials but they remained royal taxes. The 1351 Charter was granted to Henry for life and not to his heirs.

## *D Summary*

The term Palatine County speaks of a past in which parts of England enjoyed semi independent status, small kingdoms within a kingdom. It does not appear in documents until the thirteenth century, although that does not mean it did not have some sort of reality before that date, indeed it rather presupposes that it did. Even when it does appear it is not at all clear what is meant. Some of the characteristics which are supposed to set Palatine Counties apart are shared with counties and other areas not palatine while at the same time the counties undoubtedly palatine do not share common characteristics. Indeed Lancashire lacks one right, that of pardoning life and limb, which, it is claimed, is the significant feature of palatinates. The one feature that palatinates must have, although this was not unique to them, was that the king's writ did not run within them. Original writs

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<sup>50</sup> Lyon, Ann, *Constitutional History of the United Kingdom* (2002) p 68

<sup>51</sup> Alexander, J., "New evidence on the Palatinate of Chester" op. cit. p 723

<sup>52</sup> Bracton *De Legibus* (Ed Woodbine (1915) ii 346 Blackstone *Commentaries* (1<sup>st</sup> edn 1765) I 113 - 114

were issued in the name of the franchise holder. It was, for example, an offence to disturb the peace of the Earl or the Duke rather than the King's peace.

### *E The Earldom and Palatine County of Chester*

The Earldom of Chester dates from 1070 or perhaps 1071, four or five years after the Conquest, when the title was granted to the nephew of the William I, Hugh Lupus. Until 1237 the title was in the possession of a succession of Norman lords<sup>53</sup>. The penultimate earl was Ranulph de Blundeville, who died in 1232; "almost the last relic of the feudal aristocracy of the Conquest"<sup>54</sup>. Ranulph died without issue so the title escheated to the Crown. However, he was succeeded by Earl John of Scotland, the male heir of the eldest sister of Ranulph after confirmation by the king of his entitlement. John died in 1237 and the earldom was annexed to the Crown. The main result was: "...the strongest bulwark of an independent baronage was destroyed"<sup>55</sup>. In 1254 Henry III granted the county to his son. In 1301 Edward of Caernarfon (later Edward II) was made earl of Chester. Henceforth Cheshire was to be in the hands of the crown or the heir apparent. For example, during the 105 years from 1272 until 1377 for about forty years the Earldom was in the hands of the crown and for half the period 1442 – 1485 there was no earl. It should be noted when there was no earl the king never used the title Earl of Chester. Edward I in 1284 annexed the County of Flintshire to the Earldom of Chester.

It is important to understand that the County Palatinate of Chester formed part of a greater unit: the "honour" of the earldom of Chester. An "honour" was created when the lordship of a manor existed over a number of manors<sup>56</sup>. The "honour" of the earldom of Chester stretched into twenty or more counties of England and across the Channel into Normandy<sup>57</sup>. The earldom of Chester included the Palatine County of Chester but was not the same as the palatinate.

It was under Ranulph that the palatinate of Chester came into being. He claimed: "pleas of the sword", first mentioned in his great Charter of Liberties of 1215 or 1216. He also

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<sup>53</sup> Clayton, op. cit. p 51

<sup>54</sup> Stewart Brown, R., "The End of the Norman Earldom of Chester" (1920) *English Historical Review* Vol 32 pt 135 p 26

<sup>55</sup> Powicke, F. M., *Henry III* (1947) p 142

<sup>56</sup> Halsbury's Laws of England Volume 39(2) Land and Interests in land section 75

<sup>57</sup> Barraclough, op. cit. p 34

provided a register of original writs. He created an exchequer and advanced his powers of taxation<sup>58</sup>. A number of other privileges enjoyed by Cheshire have been noted above. It is the case, however, the precise origins and purpose of its creation as a county palatine “remain obscure”<sup>59</sup>. Barraclough claimed:

“If Cheshire survived as a unity, and was subsequently transformed into a palatinate and held together by a palatinate administration, it was because the crown in its own interest decided it would survive....the Charter of Liberties of 1215 or 1216 soon became to be treated as a constitutional guarantee...”<sup>60</sup>

In 1300 when Edward I confirmed and amplified Magna Carta he issued a confirmation of the liberties granted in the Charter of 1215 or 1216.

Between 1292 and 1346 there are no records of any taxes being imposed on Cheshire laymen<sup>61</sup>. Under Richard II in 1380 the county claimed exemption from taxation because it was not represented at Westminster. In 1450 national taxation was demanded from the inhabitants of Cheshire. A delegation was sent to Henry VI who confirmed the “Liberties, Freedoms and Franchises possessed by the county and agreed they should not pay”<sup>62</sup>.

In 1397 Richard II, perhaps to set it above the duchy of Lancaster, raised the palatinate to the rank of a principality. For a short time the county was to occupy a unique position among English counties; its princely status was shared only by Wales. It was not to last and was abolished by Henry IV in 1399.

Chester, like Lancaster, had its own autonomous courts and officers of justice with chief justices. It is not clear when Cheshire first acquired its court of common pleas. Certainly by the late medieval period the Cheshire county court possessed a common law jurisdiction and had competence over all civil and criminal actions in the County and was able to review decisions of lesser courts<sup>63</sup>. The King’s Bench could and did examine cases of error in the Cheshire Courts. A writ of error would be first heard by the chief

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<sup>58</sup> Barraclough, op. cit. p 36

<sup>59</sup> Driver, J.T., *Cheshire in the Later Middle Ages* (1971) p 5

<sup>60</sup> Barraclough, op. cit. p 41

<sup>61</sup> Booth, P. H. W., *The financial administration of the lordship and county of Chester 1272-1377* (1981) p 117/8

<sup>62</sup> Clayton, p. cit. p 52

<sup>63</sup> Holdsworth, op. cit. p 119

justice of Cheshire. If he affirmed it, it would be submitted to the King's Bench for confirmation or rejection<sup>64</sup>. If it was rejected the chief justice forfeited £100.

Chester had its barons of exchequer whose duties included levying debts, securing payment of arrears and eliciting profits from escheated land, as well as from pleas, fines, amercements, redemptions, recognizances and all other profits of justice<sup>65</sup>. They had, in addition a number of other officials including escheators and most significantly the Sheriff "probably the most important officers in the protection of royal interest at local level"<sup>66</sup>. There was one difference between Cheshire and, indeed Lancashire, and other English counties. It was the chief justices of Cheshire and Lancashire who held the sessions of the county court and not the Sheriff.

The creation of the Prince's Council the means by which initially the Black Prince administered the various territories entrusted to him which, of course, included the Duchy of Cornwall and the Principality of Wales has already been explained. In particular the "council of the marches of Wales" based in Ludlow during the reign of Edward IV in 1471 has been noted. The Prince's Council developed: "a very important role as a governmental institution under Edward IV, and continued to have that purpose during the reign of Henry VII"<sup>67</sup>. It became increasingly involved in the legal affairs of Cheshire during the late fifteenth century. It developed into a higher court of appeal which could facilitate administration and justice in the Prince's domains, and also assert the royal authority<sup>68</sup>.

The Tudor period saw the Palatinate of Cheshire brought into "belated conformity with the rest of England"<sup>69</sup>. Henry VII had revived the *quo warranto*<sup>70</sup> proceedings much more vigorously than his predecessors. The Justice of the Peace (Chester and Wales) Act had been passed in 1535 (repealed by the Justices of the Peace Act 1968 and Courts Act

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<sup>64</sup> Holdsworth, op. cit. p 119 - 120

<sup>65</sup> Worthington, P., *Royal Government in the Counties Palatine of Lancashire and Cheshire 1460 – 1509* (1990) Thesis (Ph. D.) University College Swansea

<sup>66</sup> *Ibid*

<sup>67</sup> *Ibid*

<sup>68</sup> *Ibid*

<sup>69</sup> Stewart-Brown, R., "The Cheshire writs of Quo Warranto in 1499" (1934) *English Historical Review* Vol XLIX p 679

<sup>70</sup> "By what warrant" – A prerogative writ obliging a person to show by what authority they hold some right power or franchise

1971) by which the appointment of justices was taken out of local hands. More significantly perhaps the Act secured the control of the Star Chamber over Cheshire as over any other county. The Jurisdiction of Liberties Act also of 1535 provided that the only writs to run throughout the realm were those of the king. By Chester and Cheshire (Constituencies) Act 1542 both the county and city were granted representation in Parliament. All that remained of the palatine status were the palatine courts expressly retained under the 1535 Act. But they no longer spelt immunity from but were simply an alternative form of application of the law common to the whole country<sup>71</sup>. The courts were eventually abolished by the Law Terms Act 1830.

### *F The Duchy and County Palatine of Lancaster*

On 6 March 1351 Edward III erected Lancashire into a County Palatine in favour of Henry<sup>72</sup> fourth earl of Lancaster. On the same date Henry was created Duke of Lancaster. The Duchy of Lancaster was only the second English Dukedom to be created. The title and palatinate were just for Henry's lifetime and lapsed on his death in March 1361. John of Gaunt, son in law of Henry and son of Edward III was created Duke of Lancaster in November 1362 but palatine rights were not granted to him until 28<sup>th</sup> February 1377. Again the grant was for his lifetime only until it was converted on 16<sup>th</sup> February 1390 to a grant to include "heirs' male"<sup>73</sup>. In this way the Duchy and palatinate came to John of Gaunt's son Henry of Bolingbroke who came to the throne as Henry IV in October 1399. Henry IV:

"...caused a charter to be passed, sanctioned by Parliament, ordaining that the Duchy of Lancaster...should remain to him and his heirs forever; and should remain, descend, be administered, and governed in like manner as if he never attained the regal dignity."<sup>74</sup>

There has been much debate about whether that County Palatine and Duchy of Lancaster should vest in the "natural" heirs to Henry IV as opposed to the "political" heirs as

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<sup>71</sup> Barraclough, op. cit. p 45

<sup>72</sup> The grandson of Edmund, the first earl of Lancaster to whom the county had been given by Henry III in 1267

<sup>73</sup> Somerville, op. cit. p 59

<sup>74</sup> Hardy, op. cit. p x. See also *A. G. of the Duchy of Lancaster v Duke of Devonshire* (1884) 13 QBD 195 at 197) (4 Co Inst 205)

monarchs<sup>75</sup>. Fascinating though the discussion is, it is outside the scope of this work. It is now generally agreed, and recognised by Acts of Parliament, for example Taxation Act 1702, that there is a union of the Duchy and the Crown in the same person but it is an inheritance separate from the Crown<sup>76</sup>. The Duchy became and remains part of the Crown's landed possessions.

For the avoidance of doubt, it should be understood the Duchy of Lancaster is an "honour" or complex of estates and owns 18,800 hectares of land in England and Wales<sup>77</sup>, which includes the County Palatine of Lancaster. Although the Duchy of Lancaster incorporates the County Palatine of Lancaster the two are distinct<sup>78</sup>.

As I have noted the Palatine County of Lancaster was based on the Chester model but with significant differences. The Charter of 1351 reserved to the king the right to correct errors in the Duke's court, to pardon life and limb and the right of direct taxation. Lancashire, unlike Chester, also had to find "knights of the shire and burgesses for parliament"<sup>79</sup>. The main consequence of the Charter was that writs within the County Palatine of Lancaster ran in the Duke's name which meant the administration of justice was in the Duke's hands. The Charter provided for a Chancery for the issue of writs, for justices to hold pleas of the crown and common pleas and for execution by the duke's writs and his own officers<sup>80</sup>. Lancaster, like Chester, was outside the usual system of legal procedures and jurisdiction operative in the other shires of England having, for example, their own chief justice. The Chancellor of the Duchy of Lancaster was also Chancellor for the County Palatine of Lancaster and he exercised an equity jurisdiction from 1474 at least<sup>81</sup>.

Like Cheshire, Lancaster had its Barons of Exchequer whose functions were similar to those already outlined. The High Sheriffs for the County Palatine, which today includes

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<sup>75</sup> The matter was discussed in *Duchy of Lancaster Case* (1561) (1 Plowd 212) (75 ER 325) (All ER Rep 146) and *Alcock v Cooke* (1829) (5 Bing 340 at 352, 354)

<sup>76</sup> Hardy, op. cit. p xii

<sup>77</sup> Duchy of Lancaster Accounts 2009/10

<sup>78</sup> Halsbury's Laws of England Vol 12(1) 302 *Extent of the Duchy of Lancaster*

<sup>79</sup> Somerville, op. cit. p 60

<sup>80</sup> Somerville, op. cit. p 59

<sup>81</sup> Somerville, R., *History of the Duchy of Lancaster 1265 1603* (1953) p 476

Lancashire, Greater Manchester and Merseyside, were and are appointed by the monarch in right of the Duchy of Lancaster<sup>82</sup>.

As with Cheshire the Duke appointed his own escheator, bailiffs, stewards, master forester, deputy master foresters and coroners<sup>83</sup>. The Duchy of Lancaster also has its own Attorney General whose rights, in the nineteenth century were not as extensive as those of the Attorney General of the Duchy of Cornwall. In *The Attorney General of the Duchy of Lancaster v The Duke of Devonshire* (1884-85)<sup>84</sup> it was decided:

“It is not competent to the Attorney General of the Duchy of Lancaster to exhibit an information in the High Court of Justice, and the court will order an information exhibited by him to be taken off the file on the application of the defendant even after answer put in by the defendant.”

By the Judicature Act 1873 the Lancashire Court of Common Pleas was absorbed into the Supreme Court. The Lancashire Chancery Court continued to operate. By the Courts Act 1971 the Chancery Court of the County Palatine of Lancashire was merged with the High Court.

The position of the Duchy of Lancaster in relation to the crown was summarised in *Alcock v Cooke* (1829)<sup>85</sup> as follows:

“Although the King holds lands as Duke of Lancaster, he holds them as King also; and the prerogatives and privileges of the King belong to him with reference to those lands, as they do with respect to those which belong to him immediately in right of his Crown; therefore, a grant under the Duchy seal is subject to all the incidents of a grant from the Crown.”

Halsbury’s Laws of England<sup>86</sup> explains it thus:

“At common law the general rule appears to be that the prerogatives of the Crown applicable to estates vested in the Crown as a body politic in right of the Crown extend to private estates vested in the monarch in her natural capacity;<sup>87</sup> and that

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<sup>82</sup> Halsbury’s Laws of England Volume 42 The Office of Sheriff para 1105

<sup>83</sup> *Jewison v Dyson* (1842) (9 Meeson and Welsby 540) (152 E R 228)

<sup>84</sup> *The Attorney General of the Duchy of Lancaster v The Duke of Devonshire* (1884-85) (L.R. Q.B.D. 195)

<sup>85</sup> *Alcock v Cooke* (1829) (5 Bing 340) (130 ER 1092) (All ER Rep 497)

<sup>86</sup> Halsbury’s Laws of England Volume 12(1) 7 Crown Private Estates 354 Application of the prerogative

<sup>87</sup> *Duchy of Lancaster Case* (1561) (1 Plowd 212 at 213, 222)

since the law attributes to the body natural of the monarch all the qualities of her body politic, the latter estates can only be dealt with subject to the same incidents and formalities in general as the former.”

*G The Duchy of Cornwall, the Palatine County of Chester and the Duchy and Palatine County of Lancaster – Similarities and Differences*

Similarities between the Duchy of Cornwall and the Earldom of Chester include the fact, for example, are both titles associated with the male heir to the throne. The difference is that the Duke of Cornwall becomes automatically Duke upon birth providing he is the son of a reigning monarch or upon his parent become sovereign. The Earldom of Chester is a new creation on each occasion. The Duchy of Cornwall, like Earldom of Chester once was and the Duchy of Lancaster is still, a great honour with lands in many counties in England and Wales. Like the Duchy of Lancaster with its special position in relation to the County Palatine of Lancaster the Duchy of Cornwall has a special relationship with the county of Cornwall.

Cheshire's fiscal independence was indicated by its absence from the Pipe Rolls from which Cornwall was also absent. Like Lancaster and Chester the High Sheriff for Cornwall was a comital appointment rather than a regnal one. Cornwall also had its escheators, havenors, bailiffs and so on. Cornwall enjoyed return of writs. Like Lancaster, but unlike Chester, it returned M. P.s to Parliament and was subject to royal taxation.

The differences are, of course, that writs in Chester and Lancaster were issued in the name of the Earl and the Duke respectively. This was not the case in Cornwall. In addition the Palatine County of Lancaster and Cheshire had their own courts, abolished in 1830 and 1971 respectively. The Duchy of Cornwall may have controlled the Courts but they were always the king's courts and it was the king's writs they enforced. In practice there was very little difference, the same common and statute law applied whether in Cornwall, Chester or Lancaster.



The Duchy of Cornwall was responsible for the Stannaries. Chester and Lancaster had nothing comparable. The Stannaries extended over the whole of Cornwall and the Stannary towns of Devon. They included the Convocation of the Tinnars of Devon and the Convocation of the Tinnars of Cornwall. The latter body having, by a Charter of 1508, the power to veto Westminster Laws detrimental to its interest. The Stannaries of Cornwall included a system of taxation called "coinage". There was also a system of Stannary Courts, in which the common law did not run and from which there was no appeal to the "courts of England". These courts continued until 1896, sixty six years after the Chester Courts were abolished and twenty three years after the Lancaster Court of Common Pleas was merged with the Supreme Court. The Lord Warden of the Stannaries had the right, indeed obligation, like the Lords Lieutenant of counties, to summon a militia of tinnars if that was necessary.

With the abolition of the Lancaster Chancery Courts it is difficult to identify any significant differences between the Duchy of Lancaster's relationship with the County Palatine of Lancaster and the Duchy of Cornwall's relationship with Cornwall. The Royal Duchies are each administered by Councils to whom various officers are appointed including, for example, an Attorney General. In both cases the Duchies appoint the Sheriff; they both enjoy the right of royal fish and right of wreck. The entitlement to *bona vacantia* and escheat is common to both as is Crown Immunity, an advantageous tax position, and the right to be consulted on legislation affecting their interest. The Royal Duchies are not, like the other Hereditary Revenues of the Crown, surrendered to the Crown Estates. Both are described by the Crown, themselves and government as "private estates".

The substantial difference is the Duke of Lancaster is always the monarch while the Duchy of Cornwall is sometimes in the hands of a Duke and sometimes in the hands of the Crown.

## *H Conclusion*

The Duchy of Cornwall in the nineteenth century and beyond tried to enhance the status of the Duchy of Cornwall and Cornwall itself by making comparisons with palatinates. They were based on the perception of Palatine Counties which followed from the

definition of Lord Coke and others. It is clear that in one crucial respect Lord Coke was wrong. A number of franchises emerged in medieval England some survived and most did not.

It is true Cornwall was only once called a Palatine County wrongly according to Matthew Hale<sup>88</sup> because it lacked “an exclusive jurisdiction”. It did not, for example, possess its own courts, its writs were issued in the King’s name and there was no central register of writs. Balanced against this the Duchy of Cornwall controlled the Stannary system. It also, while asserting it is part of the Crown, vigorously worked to maintain it was distinct from the Crown whose interests did not always coincide with those of the Duchy.

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<sup>88</sup> Hale, op. cit. p 221 *Vide Rot. Parl. 38 H. 6, n.29*



**Appendix F**  
**Articles of Agreement Between Crown**  
**And**  
**Duchy of Cornwall**  
**1620**

ARTICLES<sup>1</sup> of agreement conceyved and propounded the twelveth day of June in the years of the raigne of our Sovereigne Lord James by the grace of God of England, Scotland, / Fraunce and Ireland Kinge Defendor of the faith etc. viz. of England Fraunce and Ireland the Seaventeenth and of Scotland the two and fiftyeth BETWEENE Sir Lyonell Cranfeild knight Master./ of the Kinges Maties Wardes and Liveryes Sr Benjamin Ruddierd Knight Survayor of his Maties Liveryes Sr Jame Ley Knight Attorney of his Maties Courte of Wardes and Liveryes Sr / Myles Fleetwood Knight Receavor generall of the same Courte for and on the behalf of his Matie there vnto authorised by the kings Maties Lres vnder his Signett of the one parte And Sr / Henry Hobart Knight and Baronett Lord Cheife Justice of his Maties Courte of Comon pleas at Westminster and Chauncellor of the most excellent Prince Charles Prince of Wales Duke of / Cornwall and of Yorke and Earle of Chester Sr James Fullerton knight Mt of his Highnes Wardes Sr Charles Chibbourne knight his Highnes Serieant at lawe Sr John Walter knight his / Highnes Attorney generall and Sr Thomas Trevor knight his Hignes Sollicitor generall for and on the behalf of the said Prince his Highnes thervnto authorised by commande from / his Highnes of the other parte as followeth vizt.

Whereas many differences and questions must needs arise from tyme to tyme touching the enjoying of the bodyes and landes of Wardes whose Auncestors did hold lande of the kinge Matie in Capite or otherwise by knight/ service And alsoe held other landes of the Prince his Highnes in Capite or by Common knights service as of his dutchie of Cornewall or Earledome of Chester or otherwise by reason of the intermeddling of their severall tenures and the tytles / between his Matie and his Highnes which is most convenyent and necessary it us vpon mature deliberation had by the said persons authorised as aforesaid proposed That it shall soe please his most excellent Matie and the Prince his /Highnes the course hereafter following in certayne Articles expressed by by his Maties Privy Seale of warrant to the Master and Councell of his Courte of Wardes and Lyveries on his Mats parte there decreed And by like warrant of his Highnes / accepted ratified and approved.

1. FIRST whereas most of the lande within the County of Cornewall are held of his Hignes as duchie of Cornewall and otherwise And most of the landes in the Countys of Chester and Flint are held of his Hignes as Earle of Chester and/ otherwise And also dyvers honors Mannors and landes lying inother forrayne Countyes are parcel of the duchie of

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<sup>1</sup> Crown Estate Archives

Cornewall and thereby dyvers lands lying out of the said County of Cornewall are held in like manner of the said Prince/ as of his duchie of Cornewall And whereas dyvers landes in the said severall Countyes of Cornewall Chester and Flynt are likewise held of his Matie in Capite or otherwise wth breedith greate vuncertainty and trouble in fyndeing out the/ tenures and offices therevpon and seising the bodyes and landes of such wards in the Countys aforesaid IT is therefore thought meete that his Matie would be pleased to permit that his Highnes may have the whole benefit of all his Mats tenures in the said Countyes of Cornewall Chester and Flynt for such profit and comodetie are arise within the said Countyes onely Aswell by graunde Serieantie knightes service in cheife as other tenures of all sortes And the bodyes and landes of all Wardes that shall growe by such tenures or Wardeshippes with the inincidentes and profits depending therevpon within the said Countyes soe farr as the same are or maybe within the government or jurisdiction/ of his Maties Courte of Wards and Liveries IN consideracion whereof it is likewise thought meete that the kinges Matie shall have the benefit of all Wardeshippes mariages liveries and primer seisens of all such tenures in Capite knightes service or socage in cheife as shall belonge to his Hignes as Duke of Cornewall for lands lyinge in any place out of the County of Cornewall.

2. SECONDLY if any person doe or shall hold landes lying the Countyes of Cornwall Chester or Flint of the Kinges Majestie in Capite or by knightes service or of the Prince his Highnes in Capite or by knightes service and doe or shall also holde other landes of the kinge in Capite or by knightes service lying out of the said Countyes and doe dye his heire within age. In such case his Majestie shall have the wardeshipp of the bodye and mariage / onely of such heire being Warde BUT if in the case aforesaid any person doe or shall hold landes lying in the Countyes of Cornewall Chester or Flynt in Capite or knightes service of the kinges Majesty or of the Princes Highnes / And also do or shall hold landes lying out of the Countie of Cornewall onely of the Prince in Capite or by knightes service as Duke of Cornewall, and dye his heirs within age. In such case the Prince shall have the / Wardshipp of the bodye and mariage of such heire being Warde.

3. THIRDLY if any person doe or shall holde landes in the Countyes of Cornewall Chester or Flynt of the kinges Majesty by knightes service in Capite and doe or shall likewise holde other landes within the said Countyes of Cornewall / Chester or Flynt or out of the said Countyes either of the Kinge or Prince or of other persons and dye his heirs within age In such case as concerning the Custodye and Wardshipp of the landes of such heire The Prince

his/ Highnes shall have all the landes of such Wards lying or out of the said countyes if the said landes do hold of the dutchie of Cornwall in the Countyes of Cornewall Chester and Flynte And the kinges Majestie shall have all the landes of such wars lying out of the Countyes aforesaid not held of the said Dutchie And the like benefit/ to be taken where livery premier seisin or ouster le maine shalbe dewe upon any tenure whatsoever./

4. FOWERTHLY if any person doe or shall holde landes lying out of the said three Countyes of the kinge by knightes service in capite and doth or shall alsoe hold other lands lying within the Countyes of Cornewall Chester or Flynt/ and dye his heire within age whereby the kings Majestie by his prerogative is to have the Custody and profit of all the said landes with the said person helde the Prince his Hignes Notwithstanding shall have the custody and/ Profit of the said landes lying within the said countyes of Cornewall Chester or Flynt of whomsoever and in what manner soever the same be holden. And in like sorte if any be warde to his Majestie for landes lying out of the/ Countyes aforesaid and afterwards during his minoritie lands lying within the said Countyes of Cornewall Chester or Flynt shall discende to the said Warde the Prince shall have the Custodye and benefit of the same lands./ The like Course to be holden liverie Premier seisin or Ouster le maine shalbe due vpon any tenure whatsoever../

5. FIFTHLY it is thought meete that the Prince his Hignes his assignees and Committees shall have the ayde and assistance of his Majesties Courte of Wards and Liveryes and may there in his Majesties name or in his or their owne as the Case shall require for all the Proffittes and benefittes of all sortes belonging to his Highnes by the true intent and meaning of theis presents. /

6. LASTLY it is thought meete and Conveyent that if any question shall here after arise between the Master of the Courte of Wards and other of the Consell of the said Court for the tyme being and the Chauncellor to his Hignes and other the Commissioners of His Hignes likewise for the tyme being concerning/ tenures or any incidents or dependancies therevpon then the same shall first be debated and discussed between the said Officers respectively (and if it may be) determined without suite in lawe.





**Appendix G**  
**Law Officers Opinion**  
**Regarding**  
**Royal Mines**  
**1860**

## **Mining Rights; claim by Duchy of Cornwall<sup>1</sup>**

### **OPINION**

We have considered the statements laid before us as to the claim of H.R.H. the Duke of Cornwall to the gold and silver mines within the County of Cornwall and we have had the advantage of a personal conference with the Attorney General of the Duchy on the subject.

We are not satisfied that the facts and matters relied on in support of the claim are in anywise sufficient to countervail the general principle of law that Royal Mines are a Prerogative Right of so high a character as not to pass by any royal grant except by express words of which we find none in the Charters by which the Duchy of Cornwall was created and its possessions granted.

It is however not seemly or proper that a question of this kind between Her Majesty and the Prince should be the subject of legal proceedings and in the course of our conference with the Prince's Attorney General it appeared to us and which view as we understood met with his full concurrence that the question should be considered by some former Judge of the Highest position and eminence. And it was suggested that possible Lord Cranworth might be induced to accept the reference.

The Settlement of this question need not delay the proceedings against the persons taking the Royal Mines – Application should be made in the joint names of the Crown Officers and the Duchy Officers and if persons working should be willing to accept of proper licenses that royalties payable could be paid to a joint account to be held until settlement of the question is proposed.

If it is necessary to take proceedings they might also be taken pending settlement of the question but such proceedings will be more properly taken in the name of the Queen it being clearly understood beforehand that such course was adopted for convenience only and really on behalf of both and without in any way prejudicing the case of the Prince.

Richard Bethell    W M Jones Wm Atherton

Lincolns Inn 29<sup>th</sup> May 1860

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<sup>1</sup> TNA TS 27/818 Treasure Trove – Gold ornaments found at Amalevor Farm (1907 – 1932)

**Appendix H**  
**Board of Inland Revenue Instructions**  
**and**  
**Law Officers Opinion**  
**1913**

The Duchy of Cornwall<sup>1</sup>

Draft

OPINION

for A.G.

15<sup>th</sup> August 1913

SOLICITOR OF INLAND REVENUE

**L.O.D.**

**18<sup>TH</sup> AUGUST 13**

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<sup>1</sup> TNA L/O 3/467 – Law Officers Opinion 1913

## **THE DUCHY OF CORNWALL**

### **OPINION**

WE ARE OF OPINION THAT the same principles which render the provisions of an Act of Parliament inapplicable to the Crown unless the Crown is expressly named, apply also to the Prince of Wales in his capacity as Duke of Cornwall. This results from the peculiar title of the Prince of Wales to the Duchy of Cornwall. In other respects the Prince of Wales as being the first subject of the Crown, is, like other subjects, bound by Statutory enactments.

Taxation is not and cannot be exacted from land; it is exacted from subjects who are tax payers. For the reason given in our answer to the first question, the Duke of Cornwall is not liable to such taxation, but it may be that he will not wish to insist upon his privilege of exemption. In view of the fact that the property in the hands of the Duchy of Cornwall may change from time to time, it is in a high degree inconvenient that valuations should not proceed in the ordinary course in respect of land now belong to the Duchy, and we think that the Duchy of Cornwall should be strongly urged (without raising any question of legal rights on one side or the other) to make returns and co-operate in getting valuations settled.

We would strongly deprecate the bringing to an issue of questions such as those here set out. It is obvious that if such a matter were litigated the Duchy of Cornwall might find that even though they succeeded their success in the Courts did not conclude the matter. The practice which as we are instructed, is followed by the Crown itself, is one which avoids raising these awkward and difficult questions and we are of opinion that representation should be made to the advisers of the Duchy as to the propriety, while expressly saving what they conceive to be their legal rights of exemption, of making concessions as of grace.

**RE THE DUCHY OF CORNWALL**

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**Copy**

**INSTRUCTIONS**

**---- to----**

**the Law Officers and Mr Finlay to advise**

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**Solicitor of Inland Revenue**

**RE**  
**THE DUCHY OF CORNWALL**

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**INSTRUCTIONS**

**To the Law Officers and Mr. Finlay to advise**

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The opinion of the Law Officers and Mr Finlay is desired with reference to a questions which has arisen between the Board of the Inland Revenue and the Duchy of Cornwall, namely, whether the Officers of the Duchy are bound to make returns for the purpose of Mineral Rights Duty in accordance with the provisions of Section 20(3) of the Finance (1909-10) Act 1910.

A copy of the correspondence which has passed between the Secretary to the Duchy and the Board of the Inland Revenue is transmitted herewith, and it will be seen that the duty to give particulars under Section 20 of the Finance Act is resisted by the Duchy upon the broad ground that the Prince of Wales possesses the same prerogatives as the King, and that inasmuch as the King is not bound by the provisions of a statute unless expressly named, the Prince of Wales either absolutely or at all events so far as the lands of the Duchy of Cornwall are concerned, is not bound by the provisions of the Finance Act 1910.

A conference between the Secretary to the Duchy and the Solicitor of Inland Revenue has led to no practical result, as neither was able to admit the contentions of the other, and accordingly the Board of Inland Revenue desire to be advised as to the correctness in law of the contention of the Duchy, and as to the course to be adopted in view of it.

The general proposition that the Crown is not bound unless expressly named in a statute is of course beyond dispute, and has been affirmed by many authorities and cases of which the following are all that need here be referred to: -

Chitty Prerogative of the Crown 383

*R v Cook* 3 T.R. 519<sup>2</sup>

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<sup>2</sup> *R v Cook* (1790) (3 T.R. 519)

*Weymouth v Nugent* 6 B & S 22<sup>3</sup>

*Mersey Docks v Cameron* 11 H.L.C. 443<sup>4</sup>

*Ex parte Postmaster General* L.R. 10 C.D. 595<sup>5</sup>

*Re Oriental Bank* L.R. 28 C.D. 643<sup>6</sup>

But that the Prince of Wales who is a subject, though the first of His Majesty's subjects, possesses the same privilege is a proposition which it is submitted cannot be inferred from mere general words such as a statement that the "Lord Prince shall have therewith (i.e. with the Duchy of Cornwall) the King's Prerogative" (see Mr. Peacock's letter of 20<sup>th</sup> February 1911) because this particular prerogative of the Crown is one which is quite distinct, and differs not merely in degree but in substance from other prerogative rights of the Crown such as escheats, foreshore, royal fish, etc which can be and have been granted by the King to a subject. The King has not power to dispense with laws or the execution of laws (see Bill of Rights 1 Will & Mary Session 2 c.2) and he could not by exercise of the prerogative prevent the application to the Prince of Wales of the provisions of an Act of Parliament, and if the grant of the Duchy to the Prince affected to carry any such right or privileges it is submitted that any such grant would be inoperative.

Further, the passage in Staunford to which Mr Peacock refers is apparently to be found on p 11 under title "Wardes". The words are as follows:

"Like law is it, if the King grant an honour to the Lord Prince and his heires Kings of England, it seemth by the better opinion in M.21 Ed. 3 folio 41 that the Lord Prince shall have the therewith the King's Prerogative, because it is not severed from the Crowne after the forme as it is given, for the none shall have inheritance therof but Kings of this Realme"

The prerogative right here dealt with is that of wardship, and the passage would appear to be no authority for the possession of the Prince of Wales of all prerogative rights whatever including the special privilege now in dispute.

Search has been made for any authority directly laying down the proposition that the Duke of Cornwall qua his rights over Duchy lands, or that the Prince of Wales, as such, is

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<sup>3</sup> *Weymouth v Nugent* (1865) (6 B & S 22)

<sup>4</sup> *Mersey Docks v Cameron* (1865) (11 H.L.C. 443)

<sup>5</sup> *Ex parte Postmaster General* (1879) (L.R. 10 C.D. 595)

<sup>6</sup> *Re Oriental Bank* (1884) (L.R. 28 C.D. 643)



not bound by statute unless expressly named. No such authority has been found and Mr Peacock when pressed on the point was not able to point to any such authority.

The question appears, however, to have been raised in the case of *Attorney General to the Prince of Wales v Crossman* (L.R. 1 Ex 381)<sup>7</sup>. In that case the Defendant to an information filed by the Attorney General to the Prince of Wales applied to change the venue. In the course of the argument the Attorney General of the Duchy raised the point that the Crown was not bound by the statutes and practice as to change of venue and that the Prince of Wales suing in right of the royal possession of the Duchy enjoyed the same right (see p 383)

The Court however did not decide this point, holding that the balance of convenience was in favour of trying the case in London as desired by the Prince. The decision was therefore in favour of the Duchy on other grounds.

In support of the existence of the special prerogative right claimed in respect of the Duchy lands the Secretary to the Duchy puts forward several arguments which appear to be the following effect:

- (1) That the prerogative rights of the Duchy are identical with those of the Crown
- (2) That express mention is made of the Duchy in Acts of Parliament when those Acts are intended to apply to the Duchy, the inference being that Acts of Parliament would not so apply without express mention.
- (3) That it has been the practice to treat Duchy lands in Government Bills in precisely the same way as Crown lands the inference being that the position and prerogative rights are the same in both cases.
- (4) That in fact Duchy lands are Crown lands and the same principles apply to both

For these propositions various authorities are cited which counsel will consider, but in respect of which the following considerations are submitted.

- (1) As to the identity of the prerogative rights of the Duchy and Crown.  
The passage cited from Staunford has been dealt with above. It does not deal with the specific prerogative right here claimed. Undoubtedly many

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<sup>7</sup> *Attorney General to the Prince of Wales v Crossman* (1866) (L.R. 1 Ex 381)

prerogative rights of the Crown are possessed by the Duchy but the right here in question is, it is submitted, a special right which the Crown has not power to grant at all still less to confer by general grant.

The passage cited from the judgment in *Attorney General for the Prince of Wales v St Aubyn* (Wightwicks Reports at p.240 per Graham B)<sup>8</sup> must be read in connection with the context. The judgment is there dealing with the peculiar features of the charter granting the Duchy in connection with the question whether the Prince could sue by his Attorney General. No question of any other right was under consideration. It seems clear that the only right of the Crown there dealt with by the judgment was the right to sue by a special officer and in special form. The question was one of legal procedure only. The wide application claimed for the passage cited cannot, it is submitted, be maintained.

With regard to the practice of obtaining the assent of the Prince of Wales, as well as of the Sovereign to the introduction of bills in Parliament affecting the Duchy or Crown lands (see May's Parliamentary Practice, 10<sup>th</sup> Edition p 423) it is suggested this usage is merely a usage of Parliament and does not affect the legal question. For what is worth, however, the usage certainly shows that it is the custom to treat Crown lands and Duchy lands in this particular respect on the same footing. It is understood however that the Treasury Solicitor is unaware that the possessions of the Duchy, have, under instructions from the Treasury been always treated in Government bills in precisely the same way as Crown lands, and that the Parliamentary Counsel are also unaware of any such instructions. It is considered by the Treasury Solicitor that it would not be correct to make such general statement with regard to Duchy lands, and that the position might, and probably would, vary according to circumstances.

(2) With reference to the point that express mention is made of the Duchy in Acts of Parliament intended to bind the Duke of Cornwall, it must be conceded that it has been the practice to deal expressly with the Duchy and Duchy lands in Acts of Parliament, and other instances might be cited in addition to those given by Mr Peacock (e.g. section 23 of the Arbitration Act 1889 52, 53Victoria c.49) But it would appear to be going too far to say that in default of express statutory provisions the statutes of limitation would not

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<sup>8</sup> *Attorney General to H.R.H. Prince of Wales, Duke of Cornwall v Sir John St. Aubyn and others* (1811) Wight 167)

apply to the Duke of Cornwall. In the case of *Attorney General for Prince of Wales v St Aubyn* at p 238 of Wightwick's report Graham B. states expressly that these statutes apply to the Prince when exercising the prerogative of the Crown to sue by his Attorney General by information of intrusion in the same way as they apply to the Crown when exercising that prerogative right. The specific statutes to which he referred were the Act 21 Jac. 1. cap 14<sup>9</sup> in which the Duke of Cornwall and the Duchy lands were not mentioned and the *nullum tempus* Act of 1769 (9 Geo IIIc. 16)<sup>10</sup>. It is therefore not clear that the enactment of express provisions as to limitations of actions in the case of the Duchy of Cornwall (as to which see 7 & 8 Vict. C. 105 Sections 13, 14, 71, 73<sup>11</sup> and 23, 24 Vict. c.53<sup>12</sup>) were necessitated by the fact that the Duke of Cornwall was not bound by statutes of limitation which bound the Crown or the subject or indeed by any statute unless expressly named therein, and if the judgment of Graham B. is correct it would appear that in this instance the Duke was stated to be bound though not expressly or by necessary intendment referred to. See further on this point *Attorney General v Mayor of Plymouth* Wightwick at pp 148, 159, 164<sup>13</sup>.

(3) It is no doubt the case that Duchy lands are dealt with in Acts of Parliament in a similar way to Crown lands. So are lands of the Duchy of Lancaster which are Crown lands. The Duchy is entitled to press the argument from this fact to the fullest extent, but it is submitted that even when so pressed that argument does not go very far.

(4) The most important point made on behalf of the Duchy would seem to be last, namely, that the Duchy lands are in effect part of the lands of the Crown and that any prerogative of the Crown which would be available to the Crown must be equally available with regard to those lands when in the hands of the Duke of Cornwall, and that therefore, if lands of the Crown would not be affected by a revenue law imposing a tax on lands, lands of the Duchy would equally be unaffected. It is submitted however that even if this be the case Mineral Rights Duty is not a tax on lands at all, it is a tax on the rental

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<sup>9</sup> Intrusions Act 1623

<sup>10</sup> Crown Suits Act 1769 (*nullum tempus* act)

<sup>11</sup> Duchy of Cornwall Act 1844

<sup>12</sup> Duchy of Cornwall (limitation of actions etc) Act 1860

<sup>13</sup> *Attorney General v H.R.H. Prince of Wales, Duke of Cornwall v Mayor and Commonalty to the Borough of Plymouth* (1754) (Wight 134)

value of rights to work minerals and of mineral way leaves. It is a tax on profits of a certain class and not imposed on land as land.

The general nature of the rights and position of the Duke of Cornwall are to be found set out in the *Prince's Case* (8 Rep p.1)<sup>14</sup>. That case appears to have decided that the charter granting the Duchy of Cornwall was granted by authority of Parliament and is sufficient in itself without needing any other Act to support it, that the Prince had a fee simple in the Duchy, and that judicial notice is to be taken of the Charter. Other cases in point are *Attorney General v St Aubyn* (Wightwicks Reports p 167) and *Rowe v Brenton* (Reported by Concanen, and also to be found in 8 B & C 737 and 3 M. & Ry. 133)<sup>15</sup>. As regards the lands of the Duchy in Wightwick p.242 it is stated that the King may protect the Duchy lands by his privilege of information by the Attorney General and that "the privilege exists for the protection of the Crown lands; the Duchy lands "are part of them as a member of the Royal Establishment; The Crown has at all times an interest in them "there is the same expediency and use of the prerogative to "protect them, when the Prince has them as when the King".....

Similarly in *Rowe v Brenton* (3 Man & Ry. at p.158) on the question of the admissibility in evidence of a document on the ground it was a public document, it being produced from Duchy records, Lord Tenterden said "The objection is put upon the grounds that this is a private document, and that the Duke of Cornwall is to be considered merely as any other of His Majesty's subjects, excepting only his very high rank. But I am clearly of opinion that the Duke of Cornwall is not to be considered as a private subject; when there is no Duke of Cornwall, the Duchy belongs to the Crown; it is sometimes in the hands of the Duke, sometimes in the hands of the Crown. The Crown therefore, or in other words the public, has an interest in everything that is done in the Duchy; and it appears to me perfectly immaterial whether the act done is done under the authority of the King or under the authority of the Duke, when there is a Duke and in all these matters the interest of the Crown is equally concerned."

Again at p224 (c.f. also argument of Dampier on p 221) Lord Tenterden says "considering the very peculiar nature of the Duchy of Cornwall, whether the Duchy be

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<sup>14</sup> *The Princes Case* (1606) (8 Rep 1a) (77 E.R. 481)

<sup>15</sup> *Rowe v Brenton* (1828) (8 B & C 737) (3 Man & Ry K.B. 133) (108 E.R. 1217) (Concanen's Rep 1)

vested in the Crown or in the Duke, the Crown has a peculiar interest in it at all times, and whatever is done at any period is to be received in the same manner. I am of the opinion that whatever is done during the existence of a Duke, is to be treated in the same manner as if it were done by the Crown”.

It was thereupon decided (see p. 226 per Littledale J.) that the same rules by which leases from which the Crown are authenticated prevailed in the case of leases granted by the Duke of Cornwall. It must be admitted therefore that as regards the lands which form part of the Duchy the Crown retains some special and peculiar interest, and that Duchy lands while in the hands of the Prince are not precisely in the same position as lands in the hands of a subject. The question is whether this peculiar interest is sufficient to carry with it as attached to the lands the special prerogative of the Crown which ensures that lands of the Crown shall not, without express provision, be affected by Acts of Parliament. It has been submitted above, first that the tax sought to be imposed in this case is not a tax on lands at all, and secondly that even if it be so regarded, then that this peculiar prerogative is different in substance from other prerogative rights. If this be so the arbitration proceedings of 1858 (a copy of which is sent herewith) which are called in aid by the Duchy are to a great extent irrelevant. In the proceedings in 1855 – 1858 the point in issue seem to have been (1) whether Duchy rights extended to the sea bed within the three mile limit (2) whether the soil of the ports of the Duchy of Cornwall was parcel of the Duchy and (3) whether at the least such portions of the sea bed should be held to be within the County as might be considered to be within the jurisdiction, under Common Law, of County Officers, or of the inquest and Court held for a County. The claims of the Duchy was supported by showing, inter alia the exercise by Officers of the Duchy of such prerogative rights as the Crown enjoys over Crown lands, in the area in question.

In 1904 the precise question which now arises was raised in consequence of a dispute between the Admiralty and the Duchy with regard to the fundus and foreshore of Plymouth Harbour. A copy of the case submitted to the Law Officers is attached and Counsel is referred to the arguments and authorities there put forward. No opinion was written on this reference but it is understood that the Attorney General (Sir R Finlay) conferred with the Attorney General to the Duchy (Sir A Cripps) and that a settlement was arrived at which rendered it unnecessary for the legal opinion to be determined. The

Admiralty have been requested to furnish any information at their disposal with reference to the nature of the settlement arrived at and with copies of any documents and authorities which may be of assistance and as soon as received there will be laid before Counsel.

It is understood that the Prince of Wales pays Income Tax but the Secretary to the Duchy states that a “bounty” is given by the Duchy in lieu of rates, similar, it is understood, to that which is contributed by the public revenue in respect of Government Buildings. It is assumed that the objection of the Duchy to paying rates is based on the same claim to prerogative rights as is raised in this case.

It may be mentioned that the Crown Private Estates Acts<sup>16</sup> do not appear to apply to the lands of the Duchy of Cornwall those lands being either expressly exempted, or excluded under the general provisions which prevent those Acts from applying to lands which are possessed by the Sovereign through inheritance from his predecessors. Otherwise the subjection of lands dealt with by those Acts to ordinary taxation might be held to apply to Duchy of Cornwall lands at all events while those lands are in the hands of the Crown.

Assuming that the Prince of Wales as Duke of Cornwall is bound by the Finance (1909-10) Act 1910 to pay Mineral Rights Duty, a further question arises as to whether during the minority of the Duke, which apparently continues for this purpose as long as he is under age 21 years any duty can be recovered or indeed is payable. During the minority of the Duke (See 5 Vict. Sess.2 cap 2<sup>17</sup> repealed by Section 1 of 26 27 Vict.c.49<sup>18</sup>. and Section 11 and 25, 26 Vict. c.49<sup>19</sup> and Section 38 of repealing Act, and compare 52 Geo IIIc.123, Section 11<sup>20</sup> and 25, 26 Vict. c.49<sup>21</sup>) the rights of management exercised by him are exercisable by the Sovereign or by persons acting under His authority and although all such rights are to be taken as having been done by the Duke and although the Duke himself may be bound by the Act though not expressly named, it may be argued that, having regard to the interest which the Sovereign has at all times in the Duchy and its lands, and the fact the He is exercising the rights of management by Himself as guardian

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<sup>16</sup> Crown Private Estates Act 1862 and 1873

<sup>17</sup> Duchy of Cornwall Leases etc Act 1842

<sup>18</sup> Duchy of Cornwall Management Act 1863

<sup>19</sup> Duchy of Cornwall Lands Act 1862

<sup>20</sup> Duchy of Cornwall Act 1812

<sup>21</sup> Duchy of Cornwall Lands Act 1862

or by His Officers, the prerogative of the Crown whatever may be the case when the Duke is of age, applies to the Duchy lands and, the Crown not being named in the Finance Act 1910 Mineral Rights Duty is not payable. It would appear therefore, that even if the Board of Inland Revenue be right upon the main question of principle raised in this case, the practical result may still be that no returns can be enforced and no duty can be recovered until after the Duke of Cornwall attains majority.

The Acts of Parliament relating to the Duchy of Cornwall will be found enumerated at p 1514 Volume 1 of the Chronological Table and Index of Statutes (Edition 1911) but an examination of these Acts has not thrown any further light upon the question now raised.

The following papers are transmitted herewith:-

Correspondence between the Board of Inland Revenue and the Secretary to the Duchy.

Statements on behalf of the Crown and the Duchy of Cornwall upon reference to arbitration arising under the Cornwall Submarine Mines Act 1858 (One copy only is procurable)

Case prepared for the opinion of the Law Officers, Mr. Acland K.C., and Mr. Wills as to Crown and Duchy rights in Plymouth Harbour.

Copy Duchy saving clause as usually inserted in Acts of Parliament

The Law Officers and Mr Finlay are requested to advise:-

- (1) Whether the contention of the Duchy of Cornwall that the Prince of Wales is not bound by Act of Parliament unless expressly named is correct.
- (2) Whether it is the case that lands of the Duchy of Cornwall are not affected by the provisions of Acts imposing taxation unless express reference to or mention of those lands is made in such Act.
- (3) Whether the Prince of Wales is bound to make returns and to pay Mineral Rights Duty in respect of the rental value of rights granted by the Duchy of Cornwall to work minerals and of mineral way leaves and if so how those returns can be enforced and the duty recovered.
- (4) Whether during the minority of the Prince of Wales returns can be enforced and Mineral Rights Duty can be recovered in respect of rights to work minerals and mineral way leaves granted by the Duchy.

- (5) What course should be pursued by the Commissioners in order to compel the rendering of returns and the payment of sums due in respect of Minerals Rights Duty which in the opinion of Counsel the Prince of the Duchy are bound to pay.
- (6) Generally



*(The following are all in manuscript)*

*Re the Duchy of Cornwall*

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*The principal question in this case is the position of the Duchy in respect to mineral rights Duty*

*Origin of the case*

*14 July 1910*

*Notice sent to Duchy o make returns for the purpose of the mineral rights duty*

*25 July 1910*

*Duchy sent replies that as Part I of the Finance (1909-1910) Act 1910 does not apply to the Crown or the Duchy there is no necessity to make returns.*

*After some correspondence*

*20 Feb 1911*

*Duchy write setting out their authorities for this proposition*

*(1) Passage in Staunford on Prerogative*

*(2) Passage in Graham B's judgement in Pr of Wales v St Aubyn Wightwick at p 240*

*(3) Acts intended to apply to Duchy have always been made expressly applicable. Certain acts are cited to show this, and reference is made to a statement in 1909 by the President of the Bd of Agr. In the Lords (Par. Deb' Lords 1909 vol 3 p 1058)*

*13 June*

*Inland Revenue write that they are not satisfied.*

14 June

*Duchy write pointing out that Duchy land have always been treated in Govt bills like Crown lands refer to certain Acts of Parliament in support of this. Duchy also refer to*

*(1) Appendices prepared on behalf of the Duchy on the occasions of a dispute with the Crown in 1855-58 re Cornwall Foreshores.*

*(2) The Princes Case 8 Co. Rep 1*

*(3) Concanen's report of Rowe v Brenton 1830*

14 July 1911

*Inland Rev. write that they are still not satisfied*

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*Position of the Duchy of Cornwall*  
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*Authorities*

*Princes Case*

*Chitty on Prerogative 1820 Edn pp 403-404*

*Comyns Digest Vol 7 p 203*

*The eldest son of the King becomes Duke of Cornwall without any creation and also becomes seised in fee simple of the lands of the Duchy of Cornwall without grant. In order to take without grant the eldest son must be the first born.*

*Till a prince is born the King is seised, but when born the prince is immediately seised in fee and leases made by the King may be determined by the prince.*

*It depends upon the terms of the original grant of 11 Ed 3 which has taken to be a charter confirmed by Parliament (see The Princes Case)*

*Reference may also be made to*

*1754 A.G. v Mayor of Plymouth – Wightwick 134 which decides (inter alia) (see p 149) that the statute of Limitations (as to the right of entry into lands) does not*

*apply to the Duchy lands but ??? not ??? ground of prerogative, but on the ground of the form of the grant "The estate is indissoluble and inseparable".*

*At p 160 per Legge B*

*"As to his being in possession of it as a royal prerogative I do not know that the Prince of Wales in any instance differs from other subjects; though he is the greatest subject he is still only a subject; but his estate and possessions are as effectually secured here as if he had a personal prerogative; it is a Parliamentary prerogative, they have annexed it as a prerogative"*

*This passage down to "still only a subject" is cited by Wood B apparently with approval in his dissentient judgement in A G for Pr. Of Wales v St Aubyn Wightwick 167*

*At p 240 of this latter case occurs a passage relied on by the Duchy (AG for Pr of Wales v St Aubyn at p 240)*

*Per Graham B*

*"for it forms part of my argument that the Prince of Wales stands as to these possessions precisely in the same situation that the King himself does, and that they are as entire and as much protected when they are in the possession of the Prince as when they are in the possession of the Crown and that for necessary purpose of preserving their integrity"*

*(Graham B is here dealing with the question whether the Prince could be disseised)*

*The decision in the case was that the Prince had a right to file an English information by his A.G. per land parcel of the Duchy of Cornwall*

*1828 Rowe v Brenton (Concanen's report 1830) (8 B & C 737)*

*This case decides (inter alia) that an account of the interest which the Crown has in the Duchy of Cornwall are to be considered as public acts.*

*At pp 756-7 of the B & C report it is held that for the purpose of certain evidence the king and the Duke of Cornwall must be considered as identified.*

*At p 756 it is stated in argument "It was decided very soon after the creation of the duchy that the Duke of Cornwall has possession of the Duchy with the same privilege as the king because it is never disannexed from the Crown"*

*The authority cited for this is statement in Fitzherberts Abr Prerog Ed 16*

*Which consists in a paraphrase and abridgement of a case report in the year Book 21 Ed 3 46*

*This case was one of wardship. So far as I can gather from the year Bk (which has not been translated) wardship was claimed for the Prince by virtue of the Manor of Berkhamstead which the king had granted to the Prince of Wales and his heirs kings of England.*

*It was held that the Prince of Wales had this prerogative on the ground that by the terms of the grant the Seignory was still annexed to the Crown and not be alienated.*

*[Note There is nothing to show that this refers to the Duchy of Cornwall]*

*At this point it is convenient to refer to the passage in Staunford relied on by the Duchy.*

*The passage is as follows – (sub tit Wardes) p11*

*Like law is it if the Kinge grant an honour to the Lord Prince and his heires Kings of England, it seemeth the better opinion in 21 Ed 3 fo 46 that the Lord Prince shall have therewith the King's prerogative because it is not severed from the Crowne after fourme as it is given, for none shall be inheritors therof but kinges of this Realm"*

*Staunford is there dealing with the question whether in granting away his Seignory the king can grant with the same his prerogative to the grantee.*

*It would seem that neither Fitzherbert nor Staunford are direct authorities for the broad proposition contended for the by the Duchy, but if the meaning in the case in the Year Book is correct it would seem to be applicable to any prerogative of the Crown.*

*1866 A.G. Pr of Wales v Crossman L.R. 1 Ex 381*

*The deft applied to change the venue and (at p 383) in argument the point is raised that the Crown not being named is not bound by statute nor by practice and therefore retains the same power which is also enjoyed by the Prince of Wales suing in subject of the royal possession of the Duchy.*

*Channell B deals with the argument at pp 386-7 but does not decide it though he says “We think that in this case the A.G. to the Prince of Wales must be taken to be in the same situation as A.G. to the Crown”*

*The application was dismissed on the grounds of balance of justice.*

*Prince of Wales other taxes*

*It appears that the Prince of Wales pays income tax, but does not pay rates. A bounty is given in lieu of rates.*

*The only ground upon which the Duchy can claim to escape rates would seem to be that these lands must be treated in the same way as Crown lands.*

*[For a discussion on the subject of the exemption of the Crown from charges in respect of land see Law Quarterly Oct 1912 p 378. There is nothing however in this article which is immediately germane to the present case]*

*1<sup>st</sup> Question*

*(i) Whether the contention of the Duchy of Cornwall that the Prince of Wales is not bound by the provisions of Acts of Parliament unless expressly named is correct.*

*I think that there is no need to cite authority for the proposition that the Crown is not bound by statute unless expressly named. The question would seem to be whether the Duchy is to be treated in the same way as the Crown.*

*I think that the question might be answered by saying that the Prince of Wales quâ Prince of Wales is bound by statute, but that quâ Duke of Cornwall and in respect of Duchy lands he is not bound.*

*The lands of the Duchy would appear to be in an anomalous position. They are not Crown lands strictly speaking, but they are analogous to Crown lands. At one time they may be in the hands of the sovereign, at another time in those of the Prince. It would be difficult to hold that Acts of Parliament applied at one time and not at another. I think they must be treated as Crown Land.*

*2 Whether it is the case that lands of the Duchy of Cornwall are not affected by the provisions of Acts imposing taxation unless express reference to or mention of these lands is made in any such Act*

*The answer to the above position covers this position.*

- 3 *Whether the Prince of Wales is bound to make returns and to pay Minerals Rights Duty in respect of the rental value of rights granted by the Duchy of Cornwall to work minerals and of mineral way leaves and if so how these returns can be enforced and the Duty to be recovered.*

*The instructions suggest that even though the Duchy may not be bound by statute, the mineral rights duty is not a tax on land and must therefore be paid by the Prince in his capacity of a subject.*

*I do not think that this is a tenable view. Mineral rights duty is imposed by sec 20 of the Finance (1909-1910) Act 1910 and is under Part I which is headed Duties on Land Value. It is imposed upon the proprietor on the rent he actually receives or, if he works the minerals himself, upon a hypothetical rent. If it be correct to say that the statute does not apply to the Prince quâ Duke of Cornwall or to the Duchy lands I do not think that this tax can be due from him. The returns (s 20 ss (3)) are to be furnished by the proprietor and, quâ proprietor, the Prince is ex hypothesi, not affected. Further the returns are in respect of rights to work minerals which are similarly not affected.*

- (4) *Whether during the minority of the Prince of Wales returns can be enforced and mineral rights duty be secured in respect of rights to work minerals and mineral way leaves granted by the Duchy.*

*Until the Duke of Cornwall is 21 his rights are to be exercised by the Sovereign or by any persons acting under the authority of the sovereign*

26 & 27 Vic C 49 s 38<sup>22</sup>

*Assuming that the Prince is liable, it would appear to be impossible to recover these duties while the Prince is under age inasmuch as it would appear to involve an information against the Crown.*

- (5) *What course should be pursued by the Commissioners in order to compel the rendering of returns and the payment of sums due in respect of mineral rights duty which in the opinion of Counsel the Prince or the Duchy are bound to pay*

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<sup>22</sup> Duchy of Cornwall Management Act 1863 section 38

*It does not arise*

*I have not drafted an opinion as I see that Mr Finlay is with the LOO*





**Appendix I**  
**Copy Papers**  
**From**  
**TNA T 160/632**  
**“Royal Family Civil List in relation to the hereditary and**  
**temporary revenues of the Crown”**  
**1936**

**Memorandum from TNA T 160/632/1**

**Royal Family. Civil List: Duchies of Cornwall and Lancaster;  
memoranda and correspondence in connection with discussion of  
Civil List, 1936**

Mr Ferguson

The question of the Duchy revenues is one of policy. The reasons for which H.M. Government and previous Governments have resisted a change are (a) that they do not think it expedient for the Crown to be entirely dependent for its income on Parliament; and (b) that if the Exchequer took over the Duchy Revenues and the loss was fully made good by State Grants, the charge to the Exchequer for the Royal Family would be substantially increased and the easier mark for criticisms that it is at present. On the other hand some of the opposition would take the contrary view on (a) and would regard (b) as an advantage.

The only arguments appropriate to a written memorandum seem to be:

(1) that the Duchies are by law the private and personal property of the individual who happened to wear the Crown (or his eldest son) and are therefore no more to be interfered with by Parliament than the private property of any other individual

(2) that the Duchy of Lancaster has no very close analogy to the Crown Estates which are mere estates whereas the Duchy of Lancaster is a system of administration with important duties and functions outside its revenue earning capacity. (How far this is true of the Duchy of Cornwall is not very clear.)

These arguments really do not go very well in harness, since the second tends to show that the Duchy of Lancaster is rather unlike an ordinary property.

*I should be inclined to suggest that the arguments are better handled orally.*

(Written by hand)

## **Appendix J**

### **Information Commissioners Decision Notices:**

**Department for Transport**

**Department for Environment, Food and Rural Affairs**

**Department for Business, Innovation and Skills**

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 February 2012

**Public Authority:** Department for Business, Innovation and Skills  
**Address:** 1 Victoria Street  
London  
SW1H 0ET

### Decision

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1. The complainant made a freedom of information request to the Department for Business Innovation and Skills (BIS) for copies of correspondence with the Duchy of Cornwall on the Apprenticeship Skills, Children and Learning Bill. BIS refused the request by relying on the exemptions in section 37(1)(a) (communications with Her Majesty etc), section 40(2) (personal information) and section 42 (legal professional privilege). The Commissioner has investigated the complaint and found that some of the withheld information was exempt under section 37(1)(a) but the public interest favoured disclosure. For the remaining information the Commissioner found that either it was exempt under section 37(1)(a) and the public interest favoured maintaining the exemption, or it was exempt under section 42 and the public interest favoured maintaining the exemption or it was exempt under section 40(2).
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose some of the requested information to the complainant. The Commissioner has provided BIS with a schedule identifying the information to be disclosed.
3. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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4. On 13 December 2010, the complainant wrote to the Department for Business, Innovation and Skills (BIS) and requested information in the following terms:

*"Under the Freedom of Information Act, I would be grateful if you would forward to me copies of the correspondence in connection with consultation with the Duchy of Cornwall with regard to the Apprenticeship Skills, Children and Learning Bill of 2009."*

5. On 13 January 2011 BIS contacted the complainant to say that it needed further time to carry out a public interest test in respect of the requested information. It confirmed that the qualified exemptions that applied were section 37(1)(a) (Communications with Her Majesty etc) and section 42 (Legal professional privilege) and that it aimed to provide a substantive response by 10 February 2011.
6. On 10 February 2011 BIS contacted the complainant again to say that it had not yet reached a decision on the balance of the public interest on these exemptions and that it now aimed to respond by 10 March 2011.
7. BIS responded substantively on 10 March 2011 and confirmed that it held information falling within the scope of the request. However, it said that it was withholding the information as it was exempt from disclosure under section 37(1)(a) (Communications with Her Majesty etc), section 40 (Personal information), section 41 (Information provided in confidence) and section 42 (Legal professional privilege). It explained why each exemption was believed to apply and in the case of section 37(1)(a) and section 42 said that it considered the public interest in maintaining each exemption to outweigh the public interest in disclosure.
8. BIS subsequently carried out an internal review of its handling of the request and wrote to the complainant on 11 April 2011. It said that it was upholding the decision to refuse the request by relying on the exemptions referred to in its original response.

## Scope of the case

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9. On 15 April 2011 the complainant contacted the Commissioner to complain about BIS' decision to refuse his request.

10. During the course of the Commissioner's investigation BIS released some of the information falling within the scope of the request to the complainant. This Decision Notice only considers whether the information which continues to be withheld should be disclosed.

## Reasons for decision

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11. The complainant has requested copies of correspondence with the Duchy of Cornwall in relation to what was then the proposed Apprenticeship Skills, Children and Learning Bill which made provision for a statutory framework for apprenticeships. The Duchy of Cornwall is all the lands and estates held by the Heir to the Throne, HRH The Prince of Wales, as Duke of Cornwall. The Prince of Wales has a right to be consulted by government on proposals which affect the interests of the Duchy.

### Section 37(1)(a) – Communications with Her Majesty etc

12. Section 37(1)(a) has been applied to all of the withheld information and therefore the Commissioner has considered this exemption in the first instance. Section 37(1)(a) provides that information is exempt if it relates to communications with Her Majesty, with other members of the Royal Family or with the Royal Household.
13. The complainant maintains that the Duchy of Cornwall is a private estate and separate legal entity to the position of Prince of Wales and that therefore correspondence with The Prince of Wales in his capacity as Duke of Cornwall should be seen as falling outside the scope of the exemption. For its part BIS has said that it accepts that for the purposes of this request the Duchy of Cornwall does not form part of the Royal Household. However, it explained that on this particular piece of legislation (the Apprenticeship Skills, Children and Learning Bill) due to the way in which the consultation was undertaken at the time, the information which has been found relevant to the request constitutes and relates to the communications with The Queen's private secretaries.
14. The Commissioner has reviewed the withheld information which comprises letters with The Queen's private secretaries, drafts of these letters, and a series of emails between government officials also including representatives of Her Majesty. The Commissioner agrees with BIS that all of the information is exempt on the basis of section 37(1)(a). This is because the information either concerns the letter sent by BIS to the The Queen's Private Secretary at Buckingham Palace or

the subsequent reply. It is important to bear in mind that the section 37(1)(a) exemption extends to cover not only correspondence with the The Queen, Royal Family and Royal Household but information that relates to such correspondence as well. Therefore the exemption can be given a relatively broad interpretation.

15. The Commissioner is satisfied that the information either constitutes communications with the Royal Household or else relates to communications with the Royal Household. Therefore the Commissioner has found that section 37(1)(a) is engaged in this instance.
16. At the time of the request section 37(1)(a) was a qualified exemption meaning that even where the exemption applies information may only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure. Since the request was made relevant provisions of the Constitutional Reform and Governance Act 2010 have been implemented. With effect from 19 January 2011 section 37 has been amended so that communications with or on behalf of the Sovereign, the Heir to the Throne and second-in-line to the Throne, are absolutely exempt. However, given that the changes are not retrospective the Commissioner must base his decision on the law as it was at the time of the request. Therefore he has carried out a public interest test in respect of the withheld information.
17. The Commissioner considers that the public interest in disclosure lies in knowing more about how The Queen and The Prince of Wales (in his capacity as Duke of Cornwall) may influence government policy and the process by which consent is obtained when Parliamentary Bills may affect the prerogatives or interests of the Crown, or in the case of the Prince of Wales, the interests of the Duchy of Cornwall. The Monarchy has a central role in the British constitution and in the Commissioner's view the public is entitled to know how the various mechanisms of the constitution operate in practice.
18. As regards the public interest in maintaining the exemption, BIS has said that the arguments against disclosure arise from the "fundamental constitutional principle" that communications between The Queen and her Ministers, including their respective Private Secretaries, are confidential. It describes this principle as Her Majesty having the right and duty to counsel, encourage and warn her Government, and being entitled to have opinions on Government Policy and to express these opinions to Ministers. BIS argues that because she is constitutionally bound to accept and act on the advice of her Ministers it is important that communications relating to such advice remain confidential in order

to maintain the Monarch's political neutrality. It argues that disclosure of the information withheld in this case under section 37(1)(a) would undermine this principle.

19. The Commissioner has considered the competing arguments and has reached the view that for some of the correspondence sent by The Queen's representatives the public interest favours maintaining the exemption. This is because disclosure of such correspondence would risk revealing the private views of The Queen. The Commissioner finds more compelling the arguments regarding the importance of free and frank communication between The Queen and her Ministers. Disclosure of this information could have an adverse impact on the ability of The Queen to correspond with her ministers if it was felt that such information may be released in response to a request under the Act. The Commissioner also finds that the public interest favours maintaining the exemption by protecting the dignity of The Queen and the Royal Family which he considers to be a factor inherent in the section 37(1)(a) exemption. This is to preserve their position and ability to fulfil their constitutional role as a unifying symbol for the nation. To the extent that disclosure would undermine the dignity of the Royal Family by invading their privacy, the Commissioner accepts that this adds further weight to maintaining the exemption.
20. Whilst the Commissioner accepts that there is a public interest in favour of disclosure he finds that these arguments are more general in nature. The Commissioner does not think that there are any particular circumstances in this case that would warrant undermining an important constitutional principle or intruding on the privacy of The Queen. For instance, there is no suggestion here that any member of The Royal Family has exerted any undue influence over government policy. Therefore, where the information reveals the views of The Queen, or the Royal Household or those acting on her behalf the Commissioner has decided that the public interest favours maintaining the exemption under section 37(1)(a). However, for the remaining information the Commissioner has found that the public interest is balanced differently.
21. Where the information constitutes a communication sent from BIS to Buckingham Palace the Commissioner considers that the information does not raise any concerns in relation to the constitutional principles on the right of the Sovereign to communicate with her Ministers in confidence. The information is more factual in that it sets out the purpose behind the proposed legislation and how it might affect the Royal Household and the Duchies of Cornwall or Lancaster. The information does not reveal the views of Her Majesty or her



representatives and therefore the Commissioner is of the view that disclosure would not prejudice the political neutrality of The Queen and would be unlikely to discourage future communications with her Ministers. However, some of this information has also been withheld under section 42 and the Commissioner will go on to consider this exemption below.

22. The Commissioner also found that for some other information the public interest favours disclosure. As he explained above, BIS has already disclosed some information falling within the scope of the request in the form of redacted emails between government officials. The names of officials were redacted under the section 40(2) exemption and a very small amount of information was redacted under section 37(1)(a). The Commissioner will go on to discuss the issue of officials' names but as regards the information redacted under section 37(1)(a) he would simply say that he can see no reason why this cannot be disclosed to the complainant. The information redacted from the emails sent to the complainant when viewed in isolation is completely innocuous and reveals nothing which would prejudice the process by which The Queen's and The Prince of Wales' consent is sought on legislation or would compromise the political neutrality of The Queen or the Royal Household. The Commissioner has also found that a small amount of the information in emails between government officials not previously disclosed to the complainant should also be disclosed for the same reasons.

#### Section 42(1) – Legal professional privilege

23. BIS has also applied the section 42(1) legal profession privilege exemption to some of the withheld information. Section 42(1) provides that information in respect of which a claim for legal professional privilege could be maintained in legal proceedings is exempt. Legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal as:

*"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the*

*client, and even exchanges between the clients and third parties if such communication or exchanges come into being for the purpose of preparing for litigation.”<sup>1</sup>*

24. There are two types of legal professional privilege. Litigation privilege will apply where litigation is in prospect or contemplated and legal advice privilege will apply where no litigation is in prospect or contemplated. In this case the withheld information constitutes emails between government officials and their legal advisers on the issue of the Royal Household and the Duchy of Cornwall being covered by the Apprenticeship skills, Children and Learning Bill as well as references to this advice contained within some of the other documents falling within the scope of the request. So long as the advice remains confidential this information will be subject to legal advice privilege. Whilst the withheld information does include legally privileged communications, the Commissioner has found that in some places section 42(1) has been applied to an entire document falling within the scope of the request when it appears that only some of the document actually refers to legal advice received. In these instances the Commissioner is concerned that the definition of legal professional privilege has been applied too broadly and therefore he has only agreed to information being withheld under this exemption where the information is very obviously legal advice or a reference to such advice. The Commissioner has identified which specific information he considers to be legally privileged in a schedule to this decision notice which will be provided to BIS.
25. The principle of legal professional privilege will only apply to communications that are confidential to the world at large. Where legal advice has been placed in the public domain or has been disclosed without any restrictions placed on its further use, privilege will have been lost. The Commissioner has seen nothing to suggest that the legal advice has been disclosed, thus waiving privilege, and he is satisfied that section 42(1) is engaged in respect of the information specified in the schedule. The Commissioner has therefore gone on to carry out a public interest test for this information.

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<sup>1</sup> Bellamy v The Information Commissioner and the Secretary of State for Trade & Industry [EA/2005/0023], para. 9.

26. As regards the public interest in disclosure the Commissioner would repeat the arguments referred to at paragraph 17 above. BIS also acknowledged that disclosure of the information may promote greater transparency and understanding of constitutional protocols and workings of government.
27. In favour of maintaining the exemption BIS has said that protecting the principle of legal professional privilege is important because it ensures that departments are able to obtain free and frank legal advice so that decisions can be made in fully informed legal context. It argued that without such comprehensive advice government decisions would not be fully informed.
28. When considering the public interest in maintaining the exemption under section 42 of the Act the Commissioner will take into account the general public interest in protecting legal professional privilege. The Commissioner's view is that there will always be a strong public interest inbuilt into the section 42 exemption. In reaching this view the Commissioner has taken into account the findings of the Information Tribunal in the case of *Bellamy v Information Commissioner & Secretary of State for Trade and Industry* in which it states:
- "...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case..."<sup>2</sup>*
29. In that case legal professional privilege was described as "a fundamental condition" of justice and "a fundamental human right". Therefore the Commissioner finds that BIS' arguments regarding the importance of it being able to obtain free and frank legal advice in confidence are strong.
30. When considering the particular weight to be given to the arguments in favour of disclosure or maintaining the exemption the Commissioner will also have regard to the particular circumstances of the case. At the time the request was received in December 2010 the legal advice was still

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<sup>2</sup> *Bellamy*, para. 35.

relatively recent in that it dated from late 2008 to early 2009. The Commissioner considers that the public interest in maintaining privilege will be stronger for legal advice which is recent because it is likely to be used in a variety of decision making processes which would be likely to be affected by disclosure. In light of this and in view of the importance of the principle of legal professional privilege itself, the Commissioner has decided that the public interest in maintaining the section 42(1) exemption outweighs the public interest in disclosure.

#### Section 40 – (Personal information)

31. BIS has said that it is withholding the names of officials featured in some of the information falling within the scope of the request by relying on section 40(2) of the Act which provides that information shall not be disclosed if it constitutes the personal data of someone other than the applicant and it satisfies one of two conditions relating to the Data Protection Act 1998 (DPA 1998). In this case the relevant condition is the first condition which is that disclosure would contravene any of the data protection principles. BIS has argued that disclosure would contravene the first data protection principle which requires that data be processed fairly and lawfully.
32. In deciding whether the exemption applies it is first necessary to consider whether the withheld information (the names of civil servants) constitutes personal data. Personal data is defined in the DPA 1998 as:  
  
‘...data which relate to a living individual who can be identified –  
    (a) from those data, or  
    (b) from those data and other information which is in the possession of, or is likely to come into the possession of the data controller,  
  
and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;’
33. The names of individuals will not always be personal data. A common name like ‘John Smith’ when viewed in isolation is unlikely to allow for that individual to be identified. Much depends on the context of the information. However, in this case the Commissioner is satisfied that the information is personal data. This is because the names of the individuals when combined with the other withheld information and the fact that it would be known that the individuals are civil servants

employed in certain government departments would allow for the individuals to be identified.

34. Having satisfied himself that the information is personal data the Commissioner has gone on to consider whether disclosure would contravene the first data protection principle. The first data protection principle states that:

'1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-

(a) at least one of the conditions in Schedule 2 is met, and  
(b) in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.'

35. BIS has argued that disclosure would contravene the first data protection principle because it would not be fair to the individuals concerned. BIS has not provided any detailed arguments as to why disclosure would be unfair except to say that the individuals concerned are junior officials who have a right to expect that it will respect their personal data in accordance with the DPA 1998.

36. In considering the fairness of disclosure the Commissioner has taken into account the following factors:

- The expectations of the individuals
- The possible consequences of disclosure
- Whether the legitimate interests of the public are sufficient to justify any negative impact on the rights and freedoms of the data subjects

37. The Commissioner's guidance on personal information states that it is important to draw a distinction between the information which senior staff should expect to have disclosed about them and what junior staff should expect to be disclosed.<sup>3</sup> The rationale for this is that the more senior a person is the more likely it is that they will be responsible for making influential policy decisions. In this case the information relates to the seeking of The Queen and the Duchy of Cornwall's consent in

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<sup>3</sup>[http://www.ico.gov.uk/for\\_organisations/freedom\\_of\\_information/information\\_request/~media/documents/library/Data\\_Protection/Detailed\\_specialist\\_guides/PUBLIC\\_AUTHORITY\\_STAFF\\_INFO\\_V2.ashx](http://www.ico.gov.uk/for_organisations/freedom_of_information/information_request/~media/documents/library/Data_Protection/Detailed_specialist_guides/PUBLIC_AUTHORITY_STAFF_INFO_V2.ashx)

relation to the Apprenticeships Skills, Children and Learning Bill. The individuals concerned are junior officials and not themselves responsible for the bill or the constitutional convention that consent is sought in such cases. The Commissioner's view is that in these circumstances the individuals concerned would have a reasonable expectation that their personal information would not be disclosed. The Commissioner would also say that having reviewed the withheld information it appears to him that the officials are not in public facing roles where one might more readily expect information about their professional life to be disclosed.

38. As regards the consequences of disclosure the Commissioner does not think that there is anything especially sensitive in the information which would have adverse consequences for the individuals for instance in terms of their careers or reputation. Indeed, if there were clear and compelling legitimate interests in favour of disclosing these names then he would be likely to conclude that disclosure would be fair. However, the Commissioner is not convinced that there is any real legitimate interest in the names themselves being released. Disclosure would add very little to the information he has ordered to be disclosed. Whilst it could be argued that there is a legitimate interest in promoting transparency and accountability the Commissioner's view is that this would be only in the most general sense due to the seniority of the officials.
39. The Commissioner has decided that disclosure of the names of officials would contravene the first data protection principle. The Commissioner also found that the name of a representative of The Queen would also contravene the first data protection principle for similar reasons and especially because this person was not a public figure. Consequently, the Commissioner has found that this information is exempt under section 40(2) of the Act.

#### Section 41 – Information provided in confidence

40. The Commissioner has not considered this exemption as he already found that the information to which this exemption has been applied is exempt on the basis of section 37(1)(a).

#### **Other matters**

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41. The complainant submitted his request to BIS on 13 December 2010. BIS provided a response within 20 working days but said that it needed

further time to consider the public interest test. It was not until 10 March 2011 that it issued a substantive response, refusing the request.

42. Under section 17(3) of the Act a public authority may extend the time to respond to a request where it needs further time to consider the public interest test. However any extension must be 'reasonable'. The Commissioner has issued guidance on how long a public authority should take to consider the public interest.<sup>4</sup> In this guidance the Commissioner made it clear that he would expect public authorities to aim to respond to all requests fully within 20 working days. Only in exceptionally complex cases would it be reasonable to take longer and in no case should the total exceed 40 working days. In this particular case the public authority took almost 3 months to issue a refusal notice and the Commissioner's view is that in the circumstances such a delay was not reasonable. Therefore the Commissioner has found that BIS breached section 17(3) in its handling of the request.

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<sup>4</sup>[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/foi\\_good\\_practice\\_guidance\\_4.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_4.pdf)



## Right of appeal

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43. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

44. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**



## **Schedule of information**

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Document 1 – disclose but with legal advice in paragraph 4 and associated tracked changes (e.g. deleted excerpt from penultimate paragraph) withheld under section 42(1).

Document 2 – disclose the 23/01/09 18:35 email from this chain but with names redacted.

Document 3 – disclose all emails but with names redacted and highlighted section withheld under section 42(1).

Document 4 – disclose all emails with names redacted.

Document 5 – disclose but with legal advice in paragraph 4 and associated tracked changes withheld under section 42(1).

Document 6 – as above.

Document 7 – disclose but with legal advice in paragraph 7 withheld under section 42(1).

Document 8 – disclose all emails with names redacted.

Document 9 – withhold under section 37(1)(a).

Document 10 – disclose all emails with names redacted.

Document 11 – disclose all emails but with names redacted and highlighted sections only withheld under section 42(1).

Document 12 – disclose but with legal advice in paragraph 4 redacted under section 42(1).

Document 13 – Disclose all emails but with names redacted and only the highlighted sections redacted under section 42(1).

## **Environmental Information Regulations 2004 (EIR)**

### **Decision notice**

**Date:** 8 February 2012

**Public Authority:** Department for Environment, Food & Rural Affairs

**Address:** Nobel House  
17 Smith Square  
London  
SW1P 3JR

### **Decision**

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1. The complainant made a request to the Department for Environment, Food and Rural Affairs (Defra) for copies of correspondence with the Duchy of Cornwall relating to the drafting of the Marine and Coastal Access Bill. Defra refused the request under the exceptions in regulation 12(5)(d) (Confidentiality of proceedings), regulation 12(5)(f) (Interests of provider of information) and regulation 13(1) (Personal data). The Commissioner has investigated the complaint and found that where regulation 12(5)(d) was applied the information should be withheld. However, the Commissioner also found that regulation 12(5)(f) and regulation 13(1) were either not engaged or the public interest favoured disclosure and that therefore the information withheld under these exceptions should be provided to the complainant. The Commissioner also found that in its handling of the request Defra breached regulation 7(1) (Extension of time) and regulation 11(4) (Representations and reconsideration).
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Defra shall disclose to the complainant the information withheld under regulations 12(5)(f) and 13(1).
3. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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4. On 16 August 2010 the complainant made a request for information to Defra for copies of correspondence between the department and the Duchy of Cornwall in connection with the drafting of the Marine and Coastal Access Bill.
5. Defra contacted the complainant on 14 September 2010 when it identified the request as a request for environmental information and therefore the Environmental Information Regulations (EIR) was the correct information access regime to apply. The Commissioner concurs with this view. Defra said that, in accordance with regulation 7(1) it needed to extend the deadline for responding to the request by a further 20 working days due to the complexity of the request.
6. Defra subsequently missed the extended deadline and so on 19 November 2010 the complainant asked for a procedural internal review to consider the delay in dealing with his request.
7. On 7 December 2010 Defra presented the findings of the review where it acknowledged that it was in breach of regulations 5 and 7 relating to the time for compliance with requests. Defra issued its substantive response to the requests on the same day and confirmed that it held information falling within the scope of the request. However it said that the information was being withheld under the exceptions in regulations 12(5)(d) (confidentiality of proceedings), 12(5)(f) (adversely affect interests of provider of information) and 13(1) (personal data). Defra explained why each exception was believed to apply and its reasons for concluding that the public interest in maintaining the exceptions outweighed the public interest in disclosure.
8. On 22 December 2010 the complainant asked Defra to carry out a full internal review of its decision to refuse his request. Defra presented the findings of this review on 3 March 2011 at which point it upheld the decision to refuse the request by relying on the exceptions referred to in its earlier response.

## Scope of the case

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9. On 14 March 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

## Reasons for decision

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10. The complainant has requested copies of correspondence with the Duchy of Cornwall in relation to what was then the Marine and Coastal Access Bill. The Duchy of Cornwall is all the lands and estates held by the Heir to the Throne, HRH The Prince of Wales, as Duke of Cornwall. The consent of The Prince of Wales is required if a bill would affect the interests of the Duchy.<sup>1</sup> Defra has applied regulation 12(5)(d) to several emails between its officials and representatives of The Prince of Wales. Regulations 12(5)(f) and 13(1) have been applied to a letter sent to the Private Secretary to The Prince of Wales and the subsequent reply. The Commissioner has first considered the application of section 12(5)(d)

### Regulation 12(5)(d) – adversely affect the confidentiality of proceedings

11. Regulation 12(5)(d) provides that:

“a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law”

12. Defra has said that the exception is engaged because disclosure would adversely affect the confidentiality of its proceedings with regard to the obtaining of Prince's consent in relation to the Marine and Coastal Access Bill. It contends that in order for the exception to be engaged the proceedings themselves do not have to be adversely affected just the confidentiality of those proceedings. In this case the confidentiality of the proceedings would be adversely affected because, it argues, disclosure of information where there was a reasonable expectation of confidence would be a breach of the common law duty of confidence.

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<sup>1</sup> [http://interim.cabinetoffice.gov.uk/making-legislation-guide/queens\\_consent.aspx](http://interim.cabinetoffice.gov.uk/making-legislation-guide/queens_consent.aspx)

13. The term 'proceedings' is not defined in the legislation. The dictionary defines the term as:
- an act or course of action;
  - institution of legal action or any step taken in legal action;
  - minutes of the meeting of a club, society etc;
  - legal action/litigation;
  - events of an occasion/day-to-day meeting.
14. Under the EIR there is an obligation to read exceptions restrictively therefore the Commissioner's view is that 'proceedings' suggests a certain level of formality and it is unlikely to cover all the activities of a public authority. In this particular case the proceedings in question are Defra's and the then government's preparation of the Marine and Coastal Access Bill and in particular the obtaining of Prince's consent. Cabinet Office guidance makes it clear that it is a requirement that the consent of the Prince of Wales is sought when a bill has the potential to affect the interests of the Duchy of Cornwall and sets out the process by which consent is obtained. Making legislation is perhaps the most important function of a government and is clearly a formal process. In these circumstances the Commissioner is satisfied that the obtaining of Prince's consent in preparation for the introduction of a government bill can be said to be "proceedings" for the purposes of this exception.
15. The Commissioner has now considered whether disclosure would have an adverse affect on the confidentiality of these proceedings. Defra has explained that its communications with representatives of The Prince of Wales in his capacity as Duke of Cornwall have the necessary quality of confidence because both sides have a reasonable expectation that the communications will not be disclosed, based on convention. Indeed, this expectation is made explicit in one of the documents which makes it clear that the communications should not be circulated more widely. The content of the exchanges is not in the public domain and therefore disclosure in response to a request under the regulations would adversely affect the confidentiality of the proceedings by releasing the information and breaching the obligation of confidence. Defra has also explained that the information has not been passed to any third parties except for the purposes for which it was created and therefore confidence has not been waived. The legal basis for this confidentiality is the common law duty of confidence and therefore the Commissioner is satisfied that disclosure under these regulations would adversely affect the confidentiality of the proceedings, with that confidentiality being provided for in law. Consequently where regulation 12(5)(d) has been applied the Commissioner has decided that the exception is engaged.

16. All exceptions in the EIR are qualified and so the Commissioner has carried out a public interest test in respect of the information withheld under 12(5)(d). In favour of disclosure the Commissioner would say that the public interest lies in knowing more about how The Prince of Wales in his capacity as Duke of Cornwall may influence government policy and the process by which his consent is obtained when Parliamentary bills may affect the interests of the Duchy of Cornwall. The Monarchy has a central role in the British constitution and in the Commissioner's view the public is entitled to know how the various mechanisms of the constitution operate in practice.
17. As regards the public interest in maintaining the exception the Commissioner's view is that there is an inherent public interest in protecting confidences and that a duty of confidence should not be overridden lightly. This is because the consequence of any disclosure of information will be to undermine, to some degree, the principle of confidentiality which is to do with the relationship of trust between confider and confidant. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected. In the *Bluck v Information Commissioner* case the Information Tribunal, quoting from *Attorney General v Guardian* in the High Court, found that:

*"...as a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence..."*<sup>2</sup>
18. As well as the general public interest in protecting confidences the Commissioner will also take into account the particular interests of the confider of the information, in this case the representatives of the Prince of Wales as well as Defra itself. On this point Defra has referred to the "established constitutional Convention that correspondence between the Heir to the Throne and Government is confidential in nature". It explained that the rights and duties that The Prince of Wales exercises depend on the confidentiality of his communications with government and this would be undermined if the information was disclosed.
19. The Commissioner views with some scepticism Defra's argument that this type of information is covered by the principle regarding the Heir to

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<sup>2</sup> *Bluck V Information Commissioner & Epsom and St Helier University NHS Trust* [EA/2006/90], para. 9.

the Throne and Government ministers being able to correspond in confidence. The information here is different from other royal communications because it concerns The Prince of Wales being consulted because legislation may affect his interests as Duke of Cornwall. Essentially he is being consulted in his role as a landowner rather than as the Heir to the Throne. In the Commissioner's view the purpose of the principle or convention referred to by Defra is to prepare the Heir to the Throne for the time when he or she will become Sovereign; to educate him/herself in the business of government. The information in this case does not form part of that process and the Commissioner does not accept that disclosure would undermine the ability of The Prince of Wales to correspond with ministers in preparation for his future role as Sovereign.

20. Whilst the Commissioner does not accept that this information is covered by the principle referred to by Defra, it remains the fact that the obligation to obtain Prince's consent when a bill may affect the interests of the Duchy of Cornwall is a valid constitutional process. Therefore, in the Commissioner's view this process still warrants protection and disclosure of this particular information would undermine this process by which ministers are able to obtain the views of The Prince of Wales as Duke of Cornwall on relevant proposed legislation.
21. The Commissioner accepts that there is a public interest in disclosure which would shed further light on the process by which Prince's consent is obtained. The Commissioner has given these arguments some weight but finds that they are more general in nature. For instance there is no suggestion that The Prince of Wales as Duke of Cornwall has exerted any undue influence over government policy. Balanced against the general public interest in upholding confidences and in protecting the process by which Prince's consent is obtained the Commissioner has found that the public interest in maintaining the exception outweighs the public interest in disclosure.

Regulation 12(5)(f) – Adversely affect the interests of provider of information

22. For two of the documents falling within the scope of the request Defra has applied regulation 12(5)(f) only. This information constitutes a letter from Defra to the Private Secretary to The Prince of Wales regarding the Marine and Coastal Access Bill together with the corresponding reply. Regulation 12(5)(f) provides that:

"a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:



(f) the interests of the person who provided the information where that person-

(i) was not under, and could not have been under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure"

23. The Commissioner is conscious that the threshold to engage an exception under regulation 12(5) of the EIR is a high one compared to the threshold needed to engage a prejudice based exemption under the Act. Under regulation 12(5) for information to be exempt it is not enough that disclosure will have an effect, that effect must be 'adverse'. Furthermore, it is necessary for a public authority to show that disclosure 'would' have an adverse effect, not that it may or simply could have an effect. With regard to the interpretation of the phrase 'would' the Commissioner has been influenced by the Tribunal's comments in the case *Hogan v Oxford City Council & Information Commissioner* (EA/2005/0026 & 0030) in which the Tribunal suggested that although it was not necessary for a public authority to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.<sup>3</sup> It is also important to stress that the prejudice has to be to the person who provided the information rather than the public authority which holds the information.
24. Of the information withheld under this exception, correspondence sent to Defra clearly falls within the scope of regulation 12(5)(f) because it is information 'provided' to it by a third party, i.e. The Prince of Wales or his representatives. However one of the documents was correspondence sent by Defra to The Prince of Wales. This information focuses on the Bill itself and represents the views and/or opinions of Defra rather than The Prince of Wales. This document does not include any information obtained from the Prince of Wales or his representatives or indeed any other third party. Regulation 12(5)(f) cannot apply to this particular information.

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<sup>3</sup> These guiding principles in relation the engagement of exceptions contained at regulation 12(5) were set out in Tribunal case *Archer v Information Commissioner & Salisbury District Council* (EA/2006/0037)



25. Where the information is within the scope of regulation 12(5)(f) the Commissioner has considered whether the three limbs of the exception are met before considering the nature of the adverse affect. As regards the first limb, the Commissioner understands that whilst it is a constitutional convention that the consent of The Prince of Wales is sought and ultimately given in cases where a bill would affect the interests of the Duchy of Cornwall, there is no actual legal obligation to give consent and therefore the first limb of the test is met. The Commissioner considers that the second limb will be met where there is no specific statutory power to disclose the information in question. It is clear that there is no such power in this case and thus the second limb is also met. Finally with regard to the third limb the Commissioner understands that The Prince of Wales has not consented to disclosure of the withheld information.
26. Defra has argued that disclosure would adversely affect The Prince of Wales by invading his privacy and could also undermine the way in which he and his representatives correspond with ministers by impinging on the constitutional convention that the Prince of Wales is able to correspond with government ministers in confidence.
27. The Commissioner has considered the arguments put forward by Defra but is not satisfied that disclosure would adversely affect The Prince of Wales in the way it suggests. This is because the fact that Defra sought and obtained the consent of The Prince of Wales for the Marine and Coastal Access Bill is already in the public domain, it being a requirement that the granting of Prince's consent be communicated to Parliament during the passage of a bill.<sup>4</sup> The Commissioner must be careful not to reveal the information itself in this decision notice but having reviewed the information falling within the scope of the request he would simply say that in his view disclosure would reveal very little beyond what is already known, and what is routinely known in similar situations.
28. The Commissioner would also repeat his earlier observation that in his view this type of information is not covered by the convention regarding the Heir to the Throne and Government ministers being able to correspond in confidence. For these reasons the Commissioner has decided that the exception in regulation 12(5)(f) is not engaged.

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<sup>4</sup> Hansard HL Vol 711 Col 421 (8 June 2009)

Regulation 13(1) – Personal data

29. Defra has also applied the regulation 13(1) exception to the two documents withheld under regulation 12(5)(f). Regulation 13(1) provides that information shall not be disclosed if it is personal data of someone other than the applicant and if it satisfies one of two conditions relating to the Data Protection Act 1998 (DPA 1998). In this case the relevant condition is that disclosure would contravene any of the data protection principles.
30. In order for the exception to apply the Commissioner must first consider whether the information is personal data. Personal data is defined in the DPA 1998 as:
- ‘...data which relate to a living individual who can be identified –  
    (a) from those data, or  
    (b) from those data and other information which is in the possession of, or is likely to come into the possession of the data controller,  
And includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;’
31. Having reviewed the information the Commissioner is satisfied that it amounts to the personal data of the Prince of Wales because it relates to his interests as Duke of Cornwall.
32. Defra has argued that disclosure of the information would contravene the first data protection principle which requires that personal data be processed fairly and lawfully and in particular shall not be processed unless one of the conditions in schedule 2 is met. Defra has not said why it believes disclosure would be unfair. However, when considering the fairness of disclosing personal data the Commissioner will usually take into account the expectations of the individual concerned, the possible consequences of disclosure and whether the legitimate interests of the public are sufficient to justify any negative impact on the rights and freedoms of the data subject.
33. The Commissioner has already said in relation to regulation 12(5)(f) above that in his view disclosure would add very little to what is already known regarding Prince’s consent on the Marine and Coastal Access Bill. In these circumstances the Commissioner is of the view that disclosure would not be unfair. Disclosure of what is already known would not have any adverse consequences for the Prince of Wales and since it is a requirement that Prince’s consent is communicated to Parliament there must have been a reasonable expectation that the particular information

covered by this exception would be disclosed. For these reasons the Commissioner has found that the exception in regulation 13(1) is not engaged in this particular case.

## **Other Matters**

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34. The complainant submitted his request on 16 August 2010. However, it was not until 7 December, almost 4 months later, that Defra issued its substantive response. Under regulation 7(1) a public authority may extend the 20 working day deadline for responding to a request to 40 working days if it reasonably believes that the complexity and volume of the information requested means that it is impracticable to comply with the request within the original deadline. By failing to respond to the request within the extended 40 working day deadline Defra breached regulation 7(1) of the Act.
35. After receiving the response to his request the complainant asked Defra to carry out an internal review on 22 December 2010. However, it was not until 3 March 2011 that Defra presented its findings. Regulation 11 of the Act provides for an applicant to make representations to a public authority if it appears to him that the authority has failed to comply with a requirement of the EIR. The public authority is obliged to consider the representations and decide if it has complied with the requirements of the EIR. However, under regulation 11(4) a public authority must notify the applicant of its decision as soon as possible and no later than 40 working days after receipt. Therefore, by failing to respond to the complainant's request for an internal review within 40 working days Defra breached regulation 11(4) of the EIR.

## Right of appeal

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36. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

37. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 8 February 2012

**Public Authority:** Department for Transport  
**Address:** Great Minster House  
Horseferry Road  
London  
SW1P  
4DR

### **Decision**

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1. The complainant has requested correspondence between the Department for Transport and the Duchy of Cornwall in relation to the Marine Navigation Aids Bill. The Department for Transport refused the request under section 37(1)(a) of the Act which provides an exemption where information relates to correspondence with The Queen, The Royal Family and The Royal Household.
2. The Commissioner's decision is that the section 37(1)(a) exemption is engaged but that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 13 December 2010, the complainant wrote to the Department for Transport and requested information in the following terms:

*"Under the Freedom of Information Act, I would be grateful if you could forward to me copies of the correspondence between your department and the Duchy of Cornwall in relation to the consultation with regard to the Marine Navigation Aids Bill."*

6. The Department for Transport responded on 13 January 2011. It stated that it held the requested information but that it was being withheld under the exemption in section 37(1)(a) of the Act because it relates to communications with the Royal Household. It concluded that the public interest in maintaining this exemption outweighed the public interest in disclosure and set out its reasons for reaching this view.
7. The Department for Transport subsequently carried out an internal review of its handling of the request and wrote to the complainant on 14 March 2011. It said that it was upholding the earlier decision to refuse the request under section 37(1)(a) and provided further reasons why this exemption applied and why it considered the public interest favoured maintaining the exemption.

## Scope of the case

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8. On 17 March 2011 the complainant contacted the Commissioner to complain about the Department for Transport's decision to refuse his request.

## Reasons for decision

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9. The complainant has requested copies of correspondence with the Duchy of Cornwall in relation to what was then the proposed Marine Navigations Aids Bill, a private member's bill introduced in 2009 which, amongst other things made provisions affecting the powers and functions of the general lighthouse authorities. The Duchy of Cornwall is all the lands and estates held by the Heir to the Throne, HRH the Prince

of Wales, as Duke of Cornwall. The consent of the Prince of Wales is required if a Bill would affect the interests of the Duchy.<sup>1</sup>

10. The Department for Transport has withheld the information it holds under the exemption in section 37(1)(a) of the Act. Section 37(1)(a) provides that information is exempt if it relates to communications with Her Majesty, with other members of the Royal Family or with the Royal Household.
11. The complainant maintains that the Duchy of Cornwall is a private estate and separate legal entity to the position of Prince of Wales and that therefore correspondence with The Prince of Wales in his capacity as Duke of Cornwall should be seen as falling outside the scope of the exemption. For its part the public authority has said that no such distinction exists in this context. It says that whilst there is no definition of the Royal Household, it should be taken to include the representatives and advisers of The Queen and the Royal Family. It goes on to say that as a matter of constitutional law there is no distinction between the official and private capacity of The Queen and The Prince of Wales and in any event the exemption in section 37(1)(a) is capable of covering all communications with The Prince of Wales.
12. The Commissioner has reviewed the withheld information which amounts to a letter from the Department for Transport to the Private Secretary to The Prince of Wales followed by a letter from the Secretary to the Duchy of Cornwall to the Department for Transport.
13. First of all, the Commissioner would say that he agrees with the public authority that for the purposes of section 37(1)(a) The Royal Household should be taken to include representatives of The Queen and The Royal Family and that therefore the withheld information would be covered by the exemption. However, even if the Commissioner were to take the complainant's stricter interpretation excluding correspondence with the Duchy of Cornwall it is clear that the exemption would still apply. This is because the first letter was sent to the Private Secretary to The Prince of Wales, rather than the Duchy of Cornwall. The second letter, whilst sent from the Duchy of Cornwall, is a response to the first letter and therefore can be said to 'relate' to that correspondence. It is important

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<sup>1</sup> [http://interim.cabinetoffice.gov.uk/making-legislation-guide/queens\\_consent.aspx](http://interim.cabinetoffice.gov.uk/making-legislation-guide/queens_consent.aspx)



to bear in mind that the section 37(1)(a) exemption extends to cover not only communications with The Queen, Royal Family and Royal Household but information that relates to such communications as well. Therefore the exemption can be given a relatively broad interpretation.

14. The Commissioner is satisfied that the information either constitutes communications with the Royal Household or else relates to communications with the Royal Household. Therefore the Commissioner has found that section 37(1)(a) is engaged in this instance.
15. At the time of the request (13 December 2010) section 37(1)(a) was a qualified exemption meaning that even where the exemption applies information may only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure. Since the request was made, provisions of the Constitutional Reform and Governance Act 2010 have been implemented, amending section 37 so that communications with or on behalf of the Sovereign, Heir to the Throne and second-in-line to the Throne are absolutely exempt. However, given that the changes are not retrospective the Commissioner must base his decision on the law as it was at the time of the request. Therefore, in this case, the public interest test must be applied in respect of the withheld information.
16. The Commissioner considers that the public interest in disclosure lies in knowing more about how The Prince of Wales in his capacity as Duke of Cornwall influences government policy and the process by which his consent is obtained when Parliamentary Bills may affect the interests of the Duchy.
17. As regards the public interest in maintaining the exemption the Department for Transport has said that the arguments against disclosure "stem from the constitutional importance of the Heir to the Throne and Government Ministers being able to correspond freely and frankly". It argues that the correspondence on the giving of the Prince's consent to a bill takes place because of the convention that his consent must be sought where bills affect the Duchy's interests. Such correspondence would, it suggests, fall within the principle of free and frank communications with ministers as any other topic.
18. The Commissioner has considered the competing arguments and reached the view that the public interest favours disclosure. The Commissioner wishes to stress that he has made his decision based on the particular circumstances of this case and on the actual content of



the information itself. In reaching his decision the Commissioner is mindful that the fact that the Department for Transport sought and obtained the consent of The Prince of Wales for the Marine Navigation Aids Bill is already in the public domain. The Commissioner must be careful not to reveal the information itself in this decision notice but having reviewed the information falling within the scope of the request he would simply say that in his view disclosure would reveal very little beyond what is already known but would allow the public to better understand the constitutional convention and the mechanism by which consent is obtained.

19. The Commissioner also views with some scepticism the Department for Transport's argument that this type of information is covered by the principle regarding the Heir to the Throne and Government ministers being able to correspond freely and frankly. The information here is different from other royal communications because it concerns The Prince of Wales being consulted because legislation may affect his interests as Duke of Cornwall. Essentially he is being consulted in his role as a landowner rather than as the Heir to the Throne. In the Commissioner's view the purpose of the principle or convention referred to by the Department for Transport is to prepare the Heir to the Throne for the time when he or she will become Sovereign; to educate him/herself in the business of government. The information in this case has not arisen as part of that process and the Commissioner does not accept that disclosure would undermine the ability of The Queen or The Prince of Wales to correspond with Ministers confidentially. For these reasons the Commissioner has decided that in all the circumstances of the case the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

## Right of appeal

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20. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

21. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
22. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 21 August 2012

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

#### **Decision (including any steps ordered)**

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1. The complainant requested copies of guidance or criteria in relation to obtaining the consent of The Crown and The Duchy of Cornwall before bills are passed into law.
2. The Commissioner's decision is the withheld information is not exempt on the basis of the exemption at section 42(1) of FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information in the pamphlet dated 15 November 2010 within the scope of the request of 24 August 2011. The information outside of the scope of the request can be found in specific parts of the pamphlet identified at paragraphs 12 and 14 below.
  - Disclose the pamphlet dated 1 August 2008 in compliance with the request of 27 September 2011.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

#### **Request and response**

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5. The complainant wrote to the public authority in August and September 2011 and requested information in the following terms:

24 August 2011

*'.....I am also aware of the fact that the Duchy [of Cornwall] need only be consulted when its "hereditary revenues, personal property of the Duke or other interests" are affected. However, those terms are very general and there must be specific criteria and guidance which expands on those terms and provides guidance to those responsible for Bills. In particular, since arguably the revenues of the Duchy of Cornwall are part of the hereditary revenues of the Crown, I would be grateful if you would explain or provide information with regard to those hereditary revenues specific to the Duchy.'*

27 September 2011

*'.....the current internal guidance that you have relating [to] Crown application on legislation.....May I emphasise that I am seeking details of the application of Crown immunity as they apply to the Duchy of Cornwall...'*

6. On 19 September 2011 the public authority responded to the request of 24 August 2011. It referred the complainant to its publicly available guide to making legislation<sup>1</sup> which in its view contained information relevant to the request. The public authority however explained that the internal guidance within the scope of his request was exempt from disclosure on the basis of section 42(1) of FOIA. On 25 October 2011 the public authority responded to the request of 27 September 2011. It informed the complainant that the information within the scope of the request was exempt from disclosure on the basis of section 42(1) of FOIA.
7. Following an internal review of its responses to both requests, the public authority wrote to the complainant on 16 November 2011. It upheld the application of the exemption at section 42(1) to all the information within the scope of both requests of 24 August and 27 September 2011.

## **Scope of the case**

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8. On 18 November 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
  9. The complainant emphasised that he was not seeking information regarding correspondence with the Royal Household. He was instead
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<sup>1</sup> [www.cabinetoffice.gov.uk/resource-library/guide-making-legislation](http://www.cabinetoffice.gov.uk/resource-library/guide-making-legislation)

seeking copies of manuals or internal materials which provide general guidance to the Cabinet Office and others on the application of laws specifically with regard to the Duchy of Cornwall. He submitted that it was clearly in the public interest that citizens understand how laws are made and applied as well as the circumstances in which the Duchy of Cornwall is consulted.

10. On the basis of the complainant's representations about the focus of his request, the Commissioner considers that he is seeking information specifically about obtaining Prince's consent to legislation only when it relates to the Duchy of Cornwall.

## Reasons for decision

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### Section 42(1)

11. Section 42(1) of FOIA reads:

*'Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.'*

12. The public authority provided the Commissioner with copies of two internal pamphlets constituting the disputed information. For the request of 24 August, it provided an internal pamphlet dated 15 November 2010 and explained that although this pamphlet had been updated in December 2011, the November 2010 version was current at the time of the request. The pamphlet for the request of 27 September is dated 1 August 2008.

### Request of 24 August 2011

13. The public authority informed the Commissioner that it did not consider all of the information in the pamphlet of 15 November 2010 fell within the scope of the request of 24 August. It submitted that information in the following paragraphs was outside the scope of the request: Paragraphs 5, 7 to 12, 17 to 21, 22 to 25, 27 to 30, 46 to 54, 57 to 59, 81 to 146 and the Appendix, save for paragraphs 3 to 7, 16, 21, 22 and 33 to 35.
14. Having reviewed the information in the paragraphs referred to above, the Commissioner finds that it is outside the scope of the request of 24 August 2011 as it does not specifically relate to obtaining The Duchy of Cornwall's consent to a bill.
15. The public authority further identified in the following paragraphs information on which it could not provide a definitive view as to whether

this fell within the scope of the request of 24 August 2011: Paragraphs 13 to 16 and 62 to 80. For reasons set out in the confidential annex to this decision notice, to be disclosed to the public authority only, the Commissioner finds that the information in these paragraphs is outside the scope of the request of 24 August. To address this point in the main body of the notice would reveal disputed information and consequently defeat the purpose of withholding the information in the first place.

Application of section 42(1) to information within the scope of the request of 24 August 2011

16. The Commissioner next considered whether the remainder of the information in the pamphlet dated 15 November 2010 was exempt from disclosure on the basis of section 42(1).
17. The Commissioner adopts the description of legal professional privilege (LPP) as set out by the Information Tribunal (the Tribunal) in *Bellamy v The Information Commissioner and the DTI*<sup>2</sup>. According to the Tribunal, LPP is '*a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as the exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation.*'
18. In describing the rationale for LPP, the Tribunal also recognised the two categories of LPP: legal advice privilege and litigation privilege. Litigation privilege applies when litigation is underway or anticipated. Legal advice privilege may apply whether or not there is any litigation in prospect. It will only cover confidential communications between the client and the lawyer made for the dominant purpose of seeking or giving legal advice.
19. The public authority submitted that the information in the pamphlet fell within the category of legal advice privilege.
20. The public authority explained that the pamphlet was prepared by an internal lawyer for the benefit of other members of the office. It noted that the Tribunal had recognised that the scope of LPP is not limited to communications with external or independent lawyers.<sup>3</sup> The public

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<sup>2</sup> EA/2005/0023 – paragraph 9

<sup>3</sup> *Calland v Information Commissioner and the Financial Services Authority*, EA/2007/0136

authority submitted that the pamphlet contained legal advice for drafters in the Office of the Parliamentary Counsel (OPC) and referred to legal advice provided by lawyers in the OPC to clients in other government departments in particular cases.

21. The public authority explained that much of the information in the pamphlet draws on confidential communications with officials in the Public Bill Offices in the House of Commons and the House of Lords as well as confidential communications between OPC lawyers and their clients. It pointed out that in the case of *Three Rivers District Council and others v Governor and Company of the Bank of England*<sup>4</sup>, Lord Scott agreed that legal advice privilege applies to the advice given by Parliamentary Counsel to the government in relation to the drafting and preparation of public bills.
22. The Commissioner agrees with the public authority that scope of LPP is not limited to communications with external or independent lawyers. He does not disagree that the principles which underpin LPP could apply to advice given by Parliamentary Counsel to the government pursuant to the drafting and preparation of public bills.
23. However, in the Commissioner's view, whether or not legal advice privilege applies to information is a question of fact which requires a careful consideration of the relevant information in context. The advice must concern legal rights, liabilities, obligations or remedies or otherwise have a relevant legal context. Advice from a lawyer on a purely financial, operational, public relations or strategic business issue is unlikely to be privileged, unless the advice was obtained within a legal context – for example, in the context of possible legal remedies on an unfavourable outcome.
24. The information in the pamphlet served (before it was revised) as a guide for drafters primarily to assist them to identify and bring to the attention of the House authorities<sup>5</sup> any part of a bill which might require the Queen's or Prince's consent before it is passed into law.
25. The Commissioner considers the information within the scope of the request of 24 August constitutes advice on a primarily operational matter. It does not appear to have been produced for the dominant purpose of providing legal advice. The information clearly refers to existing legal obligations, procedural requirements and historical

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<sup>4</sup> [2004] UKHL 48, paragraph 41

<sup>5</sup> Houses of Parliament

practices. However, the Commissioner does not consider that it was provided in a strictly legal advice-giving context. The primary motivation (and this is reflected in the nature of the information itself) was to provide drafters with indicators to assist them in determining whether any part of a bill might require the consent of The Duchy of Cornwall and should therefore be brought to the attention of the House authorities.

26. For the these reasons, the Commissioner finds that the information within the scope of the request of 24 August is not exempt from disclosure on the basis of section 42(1) of the Act.
27. In view of his finding that the exemption was not engaged, the Commissioner is not required to conduct the public interest test.

27 September 2011

28. The public authority withheld the information in the pamphlet dated 1 August 2008 on the basis of section 42(1) for the same reasons it withheld the information within the scope of the request of 24 August.
29. The Commissioner finds that the pamphlet of 1 August 2008 was not exempt from disclosure on the basis of section 42(1) of the Act for the same reasons he found section 42(1) did not apply to the information within the scope of the request of 24 August.
30. In view of this decision, it was again not necessary for the Commissioner to conduct the public interest test.



## Right of appeal

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31. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

32. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## John Kirkhope

---

**From:** casework@ico.gsi.gov.uk  
**Sent:** 14 September 2012 11:03  
**To:** John Kirkhope  
**Subject:** Freedom of Information Act - HMRC[Ref. FS50444734]

14 September 2012

Dear Mr Kirkhope

### **Freedom of Information Act (FOIA) – HM Revenue & Customs** **Case reference: FS50444734**

I write with reference to your complaint to the Information Commissioner regarding the withholding of information by HM Revenue & Customs (HMRC).

#### **Brief chronology**

On 19 February 2012 you made the following request:

*"Sir David Allen and Mr Strudwick both on behalf of the Inland Revenue gave evidence to a select committee of the House of Commons in 1971/72 that the advice the Revenue had received was that the Crown Estates Act 1862 section 8 meant the Sovereign was liable to tax on property and thus the sovereign was not liable to income tax, for example. Please advise that date of the advice received which gave that view, who gave the advice i.e. was it the Government Law Officers and when that advice was last reviewed. The liability of the Duke and Duchy of Cornwall is based on a Law Officers Opinion of 1913. Please advise when last that advice was reviewed and by whom."*

On 16 March 2012 HMRC neither confirmed nor denied that it held the information and it was exempted under s44(2) FOIA.

You appealed and on 17 April 2012 HMRC's internal review upheld the exemption at s44(2).

#### **Explanation of the Information Commissioner's decision**

The Commissioner has noted your observation that the information to which the request refers is a matter of public record as being held. He has therefore raised this matter with HMRC and asked it to explain how this could be reconciled with neither confirming nor denying that the information was held.

HMRC accepts that as the information was known to be held after lawful disclosure then the information should not have been refused under s44(2) FOIA. However, HMRC has submitted that the information should have been withheld under s44(1)(a). It also maintains that because of the reference to Law Officer's opinion, the information is exempt from disclosure by virtue of s42(1) (legal professional privilege) and s35(1)(c) (formulation of government policy).

## **Section 44(1)(a)**

Section 44(1)(a) FOIA provides that information is exempt if its disclosure by the public authority holding it is prohibited by any enactment.

The Information Commissioner recognises that HMRC is bound by a statutory duty of confidentiality set out in s18(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA). This states that HMRC cannot disclose information which is held by HMRC in connection with any of its functions. One of its functions is the assessment and collection of tax.

Section 23 of CRCA states that information prohibited from disclosure by s18(1) is exempt by virtue of s44(1)(a)FOIA *"... if its disclosure (would) specify the identity of the person to whom the information relates, or enable the identity of such a person to be deduced."*

The information that you have requested would enable the identity of the person concerned to be deduced and relates to a function of HMRC. Therefore it is caught by s23 CRCA and the duty of confidentiality at s18(1) CRCA. Consequently the Commissioner considers that s44(1)(a) FOIA applies.

The exemption at s44(1)(a) FOIA is absolute and is therefore not subject to the public interest test. I have set out the s44 exemption at the end of this letter.

As the exemption at s44(1)(a) FOIA is engaged the Commissioner has not proceeded to consider the exemptions at s42(1)(a) or s35(1)(c) upon which HMRC is also reliant.

I appreciate that the Commissioner's decision in this instance may not be the information that you hoped to receive but I trust the explanation will be of assistance. Should a formal decision notice be required its content and conclusion will be as outlined above. Please let me know within 10 working days if you require the issue of a formal decision notice. If we do not hear from you within that time this is to let you know that the case will then be closed.

Yours sincerely

Brian Payne  
Senior Case Officer

## **Freedom of Information Act 2000**

**Section 44** states that:

*(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-*

- (a) is prohibited by or under any enactment,*
- (b) is incompatible with any Community obligation, or*
- (c) would constitute or be punishable as a contempt of court.*

*(2) The duty to confirm or deny does not arise if the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1).*

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Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF

Tel: 0303 123 1113 Fax: 01625 524 510 Web: [www.ico.gov.uk](http://www.ico.gov.uk)

## **Appendix K**

**Copy correspondence between:**

**Department of Communities and Local Government**

- **Local Democracy, Economic Development and Construction Bill**

**Department of Transport**

- **Marine Navigation Aids Bill**

**Department of Environment, Food and Rural Affairs**

- **Marine Bill**

**Department of Business Innovation and Skills**

**Apprenticeship Bill**



Sir Michael Peat  
The Private Secretary to His Royal Highness the  
Prince of Wales  
Clarence House  
London  
SW1A 1BA

**Baroness Andrews OBE**  
*Parliamentary Under Secretary of State*

***Department for Communities and Local  
Government***

Eland House  
Bressenden Place  
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Tel: 020 7944 3083  
Fax: 020 7944 4538  
E-Mail: [baroness.andrews@communities.gsi.gov.uk](mailto:baroness.andrews@communities.gsi.gov.uk)

[www.communities.gov.uk](http://www.communities.gov.uk)

## **LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION BILL**

I write to formally request the consent of His Royal Highness the Prince of Wales to provisions to be included in the Government's proposed Local Democracy, Economic Development and Construction Bill.

Please find enclosed two copies of the near final draft of the Bill, which will now only be subject to minor and drafting amendments. As I am sure you will understand, the circulation of the draft should be restricted to only those who need to see it.

### **Construction Contracts**

First, we are writing to you to seek His Royal Highness the Prince of Wales' consent to introduce legislation which will affect the interests of the Duchy of Cornwall. I apologise for the fact that it is necessary to go into some detail about these provisions, as they are highly technical.

The proposed legislation will amend Part 2 (sections 104-117) of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"), which Part concerns "construction contracts". By virtue of section 117 of the Act, Part 2 already applies to "construction contracts" entered into by or on behalf of the Duchy of Cornwall. Given that the proposed new legislation will be amending Part 2, the interests of the Duchy of Cornwall will again be affected. The interests of the Duchy of Cornwall will not otherwise be affected.

The proposed provisions will be included as part of the Local Democracy, Economic Development and Construction Bill to be introduced in the 4<sup>th</sup> Session this December as trialled in the Draft Legislative Programme published in May this year.

### **Part 2 of the 1996 Act**

Part 2 of the 1996 Act concerns "construction contracts" i.e. agreements for the carrying out of a very broad range of "construction operations" (sections 104 and 105). By virtue of

section 107, Part 2 only applies to construction contracts which are “in writing”.

Section 108(1) of the 1996 Act gives each party to a construction contract the right to refer a dispute to “adjudication” (a quick, informal dispute resolution regime). In this regard, section 108(2) to (4) requires the parties to include various terms in their contract regarding adjudication (for instance, a term enabling one party to give notice to the other at any time of that party’s intention to refer a dispute to adjudication; a term requiring the adjudicator to reach a decision within a certain time period; and one prescribing that an adjudicator’s decision is binding in the interim).

Section 109 of the 1996 Act provides that contractors (those performing the work) are entitled to periodic payments (unless the work is or is estimated to take less than 45 days). Section 110(1) provides that construction contracts are to contain an “adequate mechanism” for determining what and when payments become due under the contract, and section 110(2) requires the payer to give the contractor/payee a notice (in advance of each payment) of the sum which the payer proposes to pay.

If construction contracts do not contain provisions which are consistent with section 108(2) to (4) and section 110 (or, as regards section 109, the parties fail to agree upon the amounts or the frequency or circumstances of payments), the terms of the relevant Scheme for Construction Contracts apply – one Scheme in respect of contracts for construction operations carried out in England and Wales, and the other in respect of contracts for construction operations carried out in Scotland. Where either Scheme applies, such terms have effect as implied terms of the relevant contract – in effect supplying the missing contractual provision.

In addition, Part 2 of the 1996 Act requires the giving of an appropriate notice by the payer where the payer proposes to withhold moneys (which notice may, if various conditions are met, be the same notice as that given by the payer of the sum which he proposes to pay) (section 111); allows contractors to stop working where the payer owes the contractor money (section 112); and renders ineffective clauses in construction contracts which make payments conditional on the payer having been paid by a third party (section 113).

#### Summary of proposed changes to Part 2 of the 1996 Act

The new legislation will remove the current limitation of Part 2 to construction contracts which are in writing, and will require the parties to include in their construction contract a provision allowing the adjudicator to correct minor, clerical or arithmetical errors in his or her decision. Furthermore, the new legislation will ensure that any agreement by the parties to a construction contract to the effect that one party will pay all or part of the costs of an adjudication is only valid if made after the appointment of the adjudicator.

The new legislation will also (generally speaking) prohibit clauses in construction contracts which make periodic payments conditional upon someone performing obligations under *another* contract (e.g. a clause in a sub-contract which makes payment in the sub-contract dependent on something happening in the main contract); and will amend the existing provisions relating to the notices given by a payer of the sums which the payer proposes to pay - for instance, by making it clear that such notices must be served even where the payer proposes to pay nothing at all. In addition, the new legislation will introduce provisions relating to the giving of notices by the contractor/payee or by a third party. A payee will be able to give a payment notice where, for example, the parties have agreed this in their construction contract or where, having agreed that such notices were to be given by the payer, the payer neglects to give one. Another, related provision will introduce

(in most cases) a statutory requirement on the part of the payer to pay the sums specified in these payment notices.

The final substantive clause will amend the existing provisions relating to the right of the contractor/payee to stop working when he has not been paid. For example, it will clarify that a contractor/payee may stop carrying out some (and not simply all) of the work in such a case, and will make the party who has not paid up liable to pay to the contractor stopping work a reasonable amount by way of the costs and expenses he incurs in doing so.

Granted that these proposed changes to Part 2 of the 1996 Act will apply to construction contracts entered into by or on behalf of the Duchy of Cornwall, we should be very grateful to receive the consent of the Prince of Wales.

### **Single Regional Strategy**

Secondly, we are writing to you to seek His Royal Highness the Prince of Wales' consent to introduce legislation on producing a Single Regional Strategy, which will affect the interests of the Prince of Wales and the Duchy of Cornwall.

Part 5 of the Bill (Regional Strategy) provides for a regional strategy in each region outside London. A regional strategy has to set out policies relating to sustainable economic growth, development and the use of land in the region. The regional strategy will be part of the statutory development plan for the area, so that applications for planning permission are required to be determined in accordance with the development plan unless material considerations indicate otherwise (as provided by s.38 of the Planning and Compulsory Purchase Act 2004).

The Part 5 provisions will replace Part 1 of the 2004 Act which provides for a regional spatial strategy. Part 1 of the 2004 Act applied to the Crown, and that Act further applied the Planning Acts to the Crown, so that now most changes to the town and country planning system are likely to need consent. We consider that all of Part 5 of the current Bill is capable of applying to the Crown and the Queen and Prince of Wales's private interests, and therefore that consent is required.

Your early response to this letter would be much appreciated. If you have any queries, please do not hesitate to contact Holly Manktelow in my Bill team (020 7944 3851, [holly.manktelow@communities.gsi.gov.uk](mailto:holly.manktelow@communities.gsi.gov.uk)).

I am sending a copy of this letter to the Private Secretary to her Majesty the Queen, Mr Paul Clarke at the Duchy of Lancaster, Mr Bertie Ross at the Duchy of Cornwall, Mr Julian Smith Esq at Messrs Farrer and Co and the Secretary to the Crown Estate Commissioners. A copy of the letter seeking consent in relation to Her Majesty the Queen's interest will be provided to you as well.

**BARONESS ANDREWS**





Bertie Ross Esq  
The Duchy of Cornwall  
10 Buckingham Gate  
London  
SW1E 6LA

**Baroness Andrews OBE**  
*Parliamentary Under Secretary of State*

***Department for Communities and Local Government***

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**LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION BILL**

I am writing to Her Majesty to formally request her consent for the introduction to Parliament of the proposed Local Democracy, Economic Development and Construction Bill.

I enclose for your information a courtesy copy of my letter to Her Majesty's Private Secretary and a copy of a similar letter to His Royal Highness, the Prince of Wales' Private Secretary.

**BARONESS ANDREWS**



Christopher Jessel Esq.  
Messrs Farrer & Co  
66 Lincoln Inn Fields  
London  
WC2A 3LH

**Baroness Andrews OBE**  
*Parliamentary Under Secretary of State*

***Department for Communities and Local Government***

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[www.communities.gov.uk](http://www.communities.gov.uk)

**LOCAL DEMOCRACY, ECONOMIC DEVELOPMENT AND CONSTRUCTION BILL**

I am now writing to Her Majesty to formally request her consent for the introduction to Parliament of the proposed Local Democracy, Economic Development and Construction Bill.

I enclose for your information a courtesy copy of my letter to Her Majesty's Private Secretary and a copy of a similar letter to His Majesty, the Prince of Wales', Private Secretary.

**BARONESS ANDREWS**



Minister	
Subject	
Official	

SANDRINGHAM HOUSE

29th December, 2008.

Dear Lady Andrews,

Thank you for your letter of 3rd December to Christopher Geidt regarding the Local Democracy, Economic Development and Construction Bill, which I have passed to The Queen.

I can confirm that Her Majesty has given her consent to the provisions included in this Bill.

Yours sincerely  
Edward Young

Edward Young  
The Deputy Private Secretary to The Queen

Baroness Andrews, OBE.

~~Advice please~~/Department for information  
Previous MSU case:

PS/Permanent Secretary PS/All Ministers  
PS/Spec Advisers DCLG Board Executive  
Andrew Pearson

HUGH MANKTELOW  
ANTON DEAPER ALISTAIR WOOD



From the Office  
of the Parliamentary  
Under Secretary of State

Private Secretary to The Prince of Wales  
Buckingham Palace  
London  
SW1A 1AA

## Department for **Transport**

Great Minster House  
76 Marsham Street  
London SW1P 4DR

Tel: 020 7944 5473  
Fax: 020 7944 4309  
E-Mail: paul.clark@dft.gsi.gov.uk

Web site: [www.dft.gov.uk](http://www.dft.gov.uk)

23 DEC 2009

To the Private Secretary to The Prince of Wales

This letter seeks the consent of The Prince of Wales to the Marine Navigation Aids Bill so far as it affects the interests of the Duchy of Cornwall.

The Marine Navigation Aids Bill is a private member's bill, introduced by Lord Berkeley to establish a Marine Navigation Aids Commission, to establish an Office of Marine Navigation Aids Regulation, to amend the Merchant Shipping Act 1995 and for connected purposes. Amongst other things, the Bill would make provision affecting the powers and functions of the general lighthouse authorities in a range of areas. The Bill received its First Reading on 19 November 2009 and the Second Reading is provisionally scheduled for 5 February 2010.

The current draft of the Bill has fourteen clauses. The Bill would make provision to replace the three existing general lighthouse authorities serving the United Kingdom and Ireland, Trinity House, the Northern Lighthouse Board and the Commissioners of Irish Lights, with one Marine Navigation Aids Commission serving the United Kingdom only; this Commission would be overseen by a new Office of Marine Navigation Aids Regulation. Other measures would amend the powers granted to the general lighthouse authorities and their financing provisions within the Merchant Shipping Act 1995, including strengthened powers of oversight and direction in respect of the activities of local lighthouse authorities.

The House authorities have indicated that the Prince of Wales' consent is needed concerning the interests of the Duchy of Cornwall. The consent will need to be signified at Second Reading. The portion of the Bill specifically to bring to your attention is highlighted below.

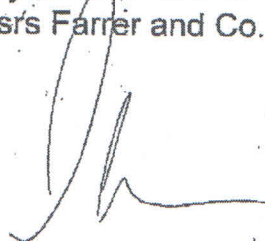
- *Control of local lighthouses* All the general lighthouse authorities of the United Kingdom and Ireland currently have powers under the Merchant

- *Control of local lighthouses* All the general lighthouse authorities of the United Kingdom and Ireland currently have powers under the Merchant Shipping Act 1995 to give directions to local lighthouse authorities in respect of the placement, maintenance and removal of lighthouses, buoys and beacons. The provisions of clause 9 of the Bill would strengthen those powers by imposing a duty to comply with such directions and creating an offence of failure to comply without reasonable excuse. The Duchy of Cornwall is, under section 193(2) of the 1995 Act, a local lighthouse authority by virtue of being the statutory harbour authority for St Mary's harbour in the Isles of Scilly. The Bill therefore affects the Duchy.
- 

The Government has indicated that it does not intend to support the Bill, although it does not object to the principle of strengthening the powers of general lighthouse authorities in the manner proposed. Nevertheless, in view of the impending Second Reading, I should be grateful if you could lay this letter, with my humble duty, before the Prince of Wales and seek his consent to place his interests, so far as they are affected by the Bill, at the disposal of Parliament for the purposes of the Bill.

In order to meet the Bill timetable, we should be grateful for a response by 22 January 2010.

Please find enclosed two copies of the latest draft of the Bill. Copies of this letter and two copies of the Bill go to the Private Secretary to Her Majesty The Queen, the Secretary to the Crown Estate Commissioners and Mr Christopher Jessel of Messrs Farrer and Co.



**PRIVATE SECRETARY**





## DUCHY of CORNWALL

10 BUCKINGHAM GATE LONDON SW1E 6LA

Telephone: 020-7834 7346 Facsimile: 020-7931 9541

RECEIVED ON  
20 JAN 2010  
PRIVATE OFFICE

21 January 2010

The Office of the Parliamentary Under Secretary of State  
Department of Transport  
Great Minister House  
76 Marsham Street  
London SW1V 4DR

*Des Lvs*

### Marine Navigation Aids Bill

A copy of your letter of 23 December to the Private Secretary to the Prince of Wales has been forwarded to me, as Secretary of the Duchy of Cornwall.

I write to confirm that the interest of His Royal Highness in right of His Duchy of Cornwall may be placed at the disposal of Parliament for the purposes of the Bill.

*Yours Faithfully*  
*W R A Ross*

W R A Ross  
Secretary

WRAR/LCH

*Copy to Cameron  
Clark & Potts  
please.  
cc Richard Bennett  
Loy Cahill.*

Nobel House  
17 Smith Square  
London SW1A 3JR

Telephone 08459 335577  
Email [ps.huw.iranca-davies@defra.gsi.gov.uk](mailto:ps.huw.iranca-davies@defra.gsi.gov.uk)  
Website [www.defra.gov.uk](http://www.defra.gov.uk)



The Private Secretary to the Prince of  
Wales  
Clarence House  
London  
SW1A 1BA

5th November 2008

From Huw Irranca-Davies MP  
Minister for the Natural and Marine Environment, Wildlife & Rural Affairs

*Dear Private Secretary,*

**Marine Bill: Queen and Prince's consent**

1. I am writing to inform you of the anticipated inclusion of the Marine Bill in the legislative programme for the forthcoming (fourth) session and to draw to your attention those parts of the Bill that we expect would require Prince's consent when the Bill is introduced to Parliament in December. I enclose two copies of the latest print of the Bill. I will write again with a final print of the Bill as soon as possible.

**Summary of the provisions in the Bill**

2. I thought it would be helpful if I first summarised what the Bill is about.

3. *Part 1* establishes an independent body, the Marine Management Organisation (MMO), to discharge, in a coordinated and consistent manner, marine functions on behalf of UK Government with the purpose of making a contribution to the achievement of sustainable development. As a Non-Departmental Public Body (NDPB), the MMO will report formally to Parliament through the Secretary of State. The MMO is designed to be a suitable body to draw up marine plans for the purposes of the new planning regime (*Part 3*). The new body will also administer marine environmental licensing and harbours regimes, manage marine fisheries, undertake nature conservation functions and use the enforcement powers set out in *Part 9* of the Bill to enforce fisheries, licensing and nature conservation legislation.

4. *Part 2* establishes the power to declare an exclusive economic zone for the United Kingdom under the United Nations Convention on the Law of the Sea. Such a zone would confirm, as a matter of international law, the UK's ability to pursue certain activities, such as environmental protection and the exploitation of fisheries resources and wind and wave power, in a marine zone extending up to two hundred miles from the coast. That Part of



the Bill also establishes a Welsh fisheries zone which enables Welsh Ministers to regulate fisheries in offshore marine areas adjacent to Wales.

5. *Part 3* introduces a new system of marine planning. It provides for the preparation of a Marine Policy Statement to articulate the priorities and objectives of the UK Government, the Welsh Assembly Government and the Northern Ireland Assembly in their marine areas. It also provides for the preparation of marine plans which take account of the Marine Policy Statement and which will cover most of the UK marine area. All decisions by public bodies in relation to the marine area will be obliged to be in accordance with the plan, unless there are overriding reasons not to do so. Cabinet discussions are ongoing regarding the inclusion of the Scottish Executive within this system. I will write confirming the position with the final print of the Bill.

6. *Part 4* establishes a new system of licensing for operations in tidal waters, excluding the licensing of fisheries. It will replace the licensing and consent controls currently exercised under Part II of the Food and Environment Protection Act 1985 and Part 2 of the Coast Protection Act 1949. This Part also removes in relation to those waters the consent requirements of the electronic communications code set out in Schedule 2 to the Telecommunications Act 1984. The considerations built into these regimes are merged into the new regime, with some modifications. It will also amend the relationship between marine licensing and certain other legislation governing activities in the marine area, including the Petroleum Act 1998 and the Electricity Act 1989 and the consenting of harbour development. Additionally, it provides for the mechanisms and powers for enforcing the licensing regime.

7. *Part 5* provides a power, across most of UK waters, to designate new Marine Conservation Zones (MCZ), in place of the current power under the Wildlife and Countryside Act 1981 to designate Marine Nature Reserves. Existing Marine Nature Reserves in England would be converted into MCZs. It also provides for new duties on public bodies to exercise their functions in ways that further the conservation objectives set for MCZs, and to not authorise activities or development where it carries a significant risk of hindering those conservation objectives. There are also powers to make byelaws to protect sites, and potential sites, from otherwise unregulated activities which may cause harm.

8. *Part 6* amends existing legislation relating to Sites of Special Scientific Interest and National Nature Reserves, clarifying under what circumstances they may extend below Mean Low Water Mark.

9. *Part 7* modernises the legislation relating to the establishment, organisation and responsibilities of Sea Fisheries Committees, establishing replacement arrangements which, in England, will take the form of new bodies called Inshore Fisheries and Conservation Authorities (IFCAs). It imposes on them a clear purpose and duties in relation to fisheries management and nature conservation, sets out their membership and funding arrangements, and gives them the power to make byelaws.

10. *Part 8* contains several Chapters amending existing legislation relating to marine fisheries. It modifies the way that Several and Regulating Orders, which are used to establish and manage shellfisheries, are made and used, including by removing some of the disincentives to applying for Orders and by making practical improvements to the way they operate. It extends existing conservation controls, such as the power to set catch limits, to anglers and other unregulated fishermen. It also clarifies an existing power to



allow the costs of fisheries management to be recouped from the fisheries industry and repeals some redundant legislation.

11. In addition, *Part 8* amends legislation on fisheries in inland waters, and fisheries of migratory fish (primarily contained in the Salmon and Freshwater Fisheries Act 1975, the Salmon Act 1986 and the Water Resources Act 1991). It gives new powers to the Environment Agency to conserve and manage migratory fish, including powers to make emergency byelaws to respond to unforeseen threats to fish stocks, and powers to introduce a new regulatory system for the movement of live fish where necessary to protect national and local biodiversity. Other small amendments include the repeal of certain obsolete offences.

12. *Part 9* provides for the appointment of marine enforcement officers and for a set of common enforcement powers for enforcing licensing, nature conservation and fishing rules in the marine area. It establishes the powers of such officers to enforce fisheries legislation and deal with goods and monies, and confers power to introduce an administrative penalties scheme for fisheries offences.

13. *Part 10* introduces new powers and a duty on the Secretary of State and Natural England to extend recreational access to the English coast and to enable the creation, as far as is possible, of a continuous route around the coast wide enough to allow unconstrained passage on foot, and recreational space. In considering the choice of route, the Secretary of State and Natural England are to be required, among other considerations, to aim to strike a fair balance between the interests of the public in acquiring a right of access and the interests of any owner or occupier of land over which the right would be conferred. This Part also includes powers for the Welsh Assembly Government to establish a route to extend recreational access to the Welsh coast.

14. *Part 11* amends legislation in relation to Natural England and the Countryside Commission for Wales and modifies the regime governing harbours (such as procedures for the making of certain harbour orders) set out in the Harbours Act 1964. Finally, it introduces a new Part 4A to the Energy Act 2008 which applies the regime of navigational controls under the Coast Protection Act 1949 to certain gas and carbon storage activities in the marine area.

15. Finally, *Part 12* contains supplementary provisions including financial provisions, commencement arrangements and repeals.

#### **Need for consent**

16. I draw your attention to a number of provisions and areas of the Bill outlined below which we expect would require Queen's and Prince's consent.

#### *Part 3: Marine Planning*

17. *Part 3* will not directly affect the Crown or Duchies as landowners, but it will provide a framework within which all decision-making by public authorities within the marine area will fit.

#### *Part 4: Marine Licensing*



18. Clause 72 under *Part 4* provides an exemption from the marine licensing regime for dredging activities carried out by or on behalf of harbour authorities. This will be relevant to the Duchy of Cornwall as the harbour authority for the Isles of Scilly.

19. Clause 113 provides that provisions of the *Part* bind the Crown, save that:

- a) no contravention by the Crown of any provision shall make the Crown criminally liable, but on application the High Court can declare unlawful any act or omission of the Crown; and
- b) the Secretary of State can certify as respects Crown land and powers of entry exercisable in relation to that land, that in the interests of national security the powers should not be exercisable in relation to that land.

*Part 5: Marine Conservation Zones*

20. Under *Part 5*, the nature conservation provisions will involve restrictions on land management in relation to Crown land, as well as Duchy of Cornwall or Lancaster land, in England and Wales. The land in question includes the seabed, the bed of tidal rivers, the foreshore and areas adjoining these. This *Part* of the Bill will enable the identification and designation of MCZ. It will not impose any duties directly upon the Crown or Duchies as landowner, but the designation may require other public authorities to impose restrictions on certain activities within these areas (for example, fishing or other recreational activities) for nature conservation purposes. The designation will also influence public authorities in considering applications for statutory consents in relation to designated areas.

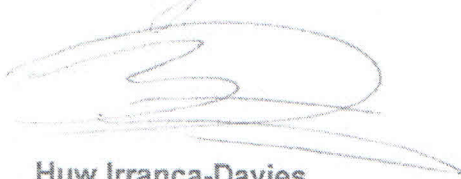
*Part 7: Inshore Fisheries and Conservation Authorities*

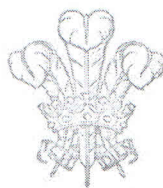
21. Under *Part 7*, IFCA powers to make byelaws regulating the exploitation of sea fisheries resources will extend to a private fishery in an MCZ or a European marine site protected under the Conservation (Natural Habitats, &c) Regulations 1994. Those powers will extend also to any other private fishery but with the proviso that where the byelaw will significantly prejudice the fishery the consent of the owner of that fishery will be required. Sea Fisheries Committees currently regulate private fisheries only with the consent of the owner of that fishery.

*Part 10: Coastal Access*

22. Under *Part 10*, clause 312 provides that "This *Part* is binding on the Crown and applies in relation to any Crown land as it applies in relation to any other land." This means that the whole of *Part 10* is binding on the Crown, so any Crown land on the coast could potentially be affected by the proposals. This would also apply to Duchy of Cornwall land on the coast. In this clause, "Crown land" includes an interest in land belonging to Her Majesty in right of the Crown or in right of Her private estates.

23. I am writing in similar terms to the Private Secretary to Her Majesty.

*My Kind Regards,*  
  
Huw Irranca-Davies



CLARENCE HOUSE  
LONDON SW1A 1BA

Private and Confidential

From: The Principal Private Secretary to TRH The Prince of Wales and The Duchess of Cornwall

12th January, 2009

*Aen R. Irranca-Davies,*

Thank you for sending me details about the forthcoming Marine Bill.

I can confirm that The Prince of Wales is content with the Bill.

*Yours sincerely,  
Michael Peat*

Sir Michael Peat

Huw Irranca-Davies MP,  
Minister for the Natural and Marine Environment, Wildlife and Rural Affairs,  
Nobel House,  
17 Smith Square,  
London,  
SW1A 3JR.

**From:** Legal Adviser's  
**Sent:** 23 January 2009 18:35  
**To:**

**Cc:**  
**Subject:** FW: Apprenticeships Bill - application to Her Majesty

I enclose the email from [redacted] at Farrer Solicitors, setting out his instructions in relation to the application of the Apprenticeships Bill to Her Majesty in her personal capacity.

However, I understand from our discussion today that it might not be possible for what they want to happen without there being express provision in the Bill. I haven't had a chance to consider this in detail, but thought that I should forward this email to you now so that you are aware of what is being proposed. I look forward to discussing this with you on Monday.

Have a good weekend.

Legal Adviser's Office  
Department for Innovation, Universities and Skills  
Kingsgate House, Victoria Street, London SW1E 6SW  
Tel:

**From:** [mailto:  
**Sent:** 09 January 2009 17:57  
**To:**  
**Cc:**  
**Subject:** RE: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

In which case, we can't have an answer by Monday because he isn't back until then!

Constitutional Settlement Division  
Ministry of Justice

102 Petty France SW1H 9AJ

Tel

-----Original Message-----

**From:** Legal Adviser's  
**Sent:** 09 January 2009 17:30  
**To:**  
**Cc:**  
**Subject:** RE: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

I understood that this is something that was considering. I have looked into the issue, and then sought advice from COCAD, who referred me to MoJ. So I think that the answer needs to come from

Universities and Skills Team  
Legal Adviser's Office  
Department for Innovation, Universities and Skills  
Kingsgate House, Victoria Street, London SW1E 6SW  
Tel:

**From:**  
**Sent:** 09 January 2009 17:01  
**To:**  
**Cc:**  
**Subject:** RE: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

First, my legal adviser on this is still on leave and not back until Monday. Second, is this not also something that your own legal advisers are considering? In fact, the paragraph in question was one that you inserted into the letter.

Constitutional Settlement Division  
Ministry of Justice

102 Petty France SW1H 9AJ

Tel

-----Original Message-----

**From:** Legal Adviser's [

**Sent:** 09 January 2009 16:55

**To:**

**Cc:** Joint Apprenticeships Unit

**Subject:** RE: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

**Importance:** High

Universities and Skills Team

Legal Adviser's Office

Department for Innovation, Universities and Skills

Kingsgate House, Victoria Street, London SW1E 6SW

Tel:

**From:**  
**Sent:** 06 January 2009 13:10  
**To:**  
**Cc:** Apprenticeships  
**Subject:** RE: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

They are almost ready to respond. They have been having internal discussions, including with their lawyers, about how to deliver what they want and will be getting back to us shortly.

Constitutional Settlement Division  
Ministry of Justice

-----Original Message-----

**From:**  
**Sent:** 15 December 2008 12:14  
**To:**  
**Cc:**  
**Subject:** RE: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

I am wondering if you have heard anything from the Royal Household in response to your letter about the apprenticeship proposals. The date for introduction for the Bill has been put back to early February, but Second Reading is taking place on 23 February, so we will need to know by then what Her Majesty's intentions are in relation to the Bill.

I look forward to hearing from you.

Universities and Skills Team  
Legal Adviser's Office  
Department for Innovation, Universities and Skills  
Kingsgate House, Victoria Street, London SW1E 6SW

**From:**  
**Sent:** 23 October 2008 15:24

**To:**

**Cc:**

**Subject:** RE: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

yes - they will come back to me.

Constitutional Settlement Division  
Ministry of Justice

-----Original Message-----

**From:**

**Sent:** 23 October 2008 15:13

**To:**

**Cc:**

**Subject:** RE: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

Excellent news. Thanks for all your help. Will the Palace contact you with their response in due course?

---

**From:**

**Sent:** 23 October 2008 14:48

**To:**

**Cc:**

**Subject:** RE: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

Thanks. I have taken on board the comments and the letters will go out this afternoon.

Constitutional Settlement Division  
Ministry of Justice



-----Original Message-----

**From:**

**Sent:** 22 October 2008 14:43

**To:**

**Cc:**

**Subject:** RE: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

I enclose a revised version of your letter, to which we have made some changes in track changes.

Let me know if you have any queries, and thank you for your assistance in approaching the Palace about whether they want to be involved in the apprenticeship programme.

Kind regards

Universities and Skills Team  
Legal Adviser's Office  
Department for Innovation, Universities and Skills  
Kingsgate House, Victoria Street, London SW1E 6SW

---

**From:**

**Sent:** 17 October 2008 11:17

**To:**

**Cc:**

Adviser's

**Subject:** RE: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

Fine, thanks. You are the one with a timetable, not me! But we can't assume the Palace would turn anything round in a couple of days.

Constitutional Settlement Division  
Ministry of Justice  
6th Floor  
Selborne House  
54-60 Victoria Street SW1E 6QW

-----Original Message-----

**From:**

**Sent:** 17 October 2008 11:12

**To:**

**Cc:**

**Subject:** RE: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

Many thanks for your work on this and I can confirm that we did receive your draft. Please accept my apologies for the delay in responding - we are working to finalise comments and will let you have these by cop Monday.

Best wishes,

Department for Innovation, Universities and Skills

Sheffield

S1 4PQ

Tel:

Ext:

Mobile:

---

**From:**

**Sent:** 17 October 2008 11:04

**To:**

**Cc:**

**Subject:** RE: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

Did you ever get this? I haven't had any comments from you, and in the meantime I haven't sent it to the Palace.

Constitutional Settlement Division  
Ministry of Justice

Selborne House  
54-60 Victoria Street SW1E 6QW

-----Original Message-----

**From:**

**Sent:** 06 October 2008 16:37

**To:**

**Cc:**

**Subject:** RE: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

Thank you for this. Attached is the draft of the letter I propose to send to the Palace, on which I'd be grateful for your clearance.

Constitutional Settlement Division  
Ministry of Justice

Selborne House  
54-60 Victoria Street SW1E 6QW

Tel  
Fax

-----Original Message-----

**From:**

**Sent:** 26 September 2008 15:55

**To:**

**Cc:**

**Subject:** FW: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

Thank you for your email. In response to your specific questions:

- once you are covered by the Bill, does that mean that you have to offer apprenticeships at all times, or to offer them to anyone who asks for one, subject to needing the staff at all?

Being covered by the provisions of the Bill would not mean that anyone has to offer an apprenticeship. It would be when the employer needed staff or wished to take on an apprentice eg to train up for an anticipated vacancy, and the decision as to whether or not to take an individual applicant would be for the employer.

- or does it simply mean that if you then decide to offer an apprenticeship, it has to be done to a certain standard and obeying certain rules and will be subject to outside inspection etc, but that in return you get some support, possibly including a subsidy on your employer costs?

If covered by the scheme then the apprenticeship framework would set out the the quality and set out the elements of training for that occupation. The Learning and Skills Council pays for the training costs of the apprentices it supports, this funding is dependent upon the age of the apprenticeship - decreasing for those aged over 25.

- can you continue to offer apprenticeships outside the scheme?

Yes, even if covered by the legislation, the Royal Household would be able to offer apprenticeships outside of the scheme.

- what are the certifiable skills that DIUS anticipate that an apprentice in the RH will develop?

The skills will be dependant on the type of work the apprentice would be doing but, for example, could range from catering to business administration or management. A list is available here: <http://www.apprenticeships.org.uk/list/apprenticeshipsdirectory/default.htm>

- How would the support mechanisms for the apprentice work given the small size of the Household as an employer?

Many small businesses already have apprentices, so the scheme is already well suited to smaller employers. The support mechanisms are training providers (such as a Further Education College, private provider or Group Training Association), the relevant Sector Skills Council and, potentially, the local Learning and Skills Council. As well as delivering off-the-job training, Training providers usually undertake the administration involved on behalf of the employer.

In terms of support for the Royal Household, the local Learning and Skills Council could provide assistance in identifying appropriate training providers. Although there is no Sector Skills Council with direct responsibility for the Royal Household, Government Skills may be the most appropriate and would be likely to help if needed.

Please contact me if you have further questions about the apprenticeships programme and possible application to the Royal Household.

Regards,

DCSF and DIUS Joint Apprenticeships Unit  
Department for Innovation, Universities and Skills

Sheffield  
S1 4PQ

Tel:  
Ext:  
Mobile:

---

**From:**  
**Sent:** 22 September 2008 11:31  
**To:** ( ) Joint Apprenticeships Unit  
**Subject:** Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

Your lawyers have been in touch with our lawyers about the provisions of the Apprenticeships Bill and in particular what I understand is your policy desire for the Bill to apply to the Royal Household. Before we would be able to approach the RH to ascertain their views on this issue (which, although not definitive, are always useful to know before we start), I'd be grateful for a fuller explanation of what including them in the Bill would in fact involve. In particular,

- once you are covered by the Bill, does that mean that you have to offer apprenticeships at all times, or to offer them to anyone who asks for one, subject to needing the staff at all?
- or does it simply mean that if you then decide to offer an apprenticeship, it has to be done to a certain standard and obeying certain rules and will be subject to outside inspection etc, but that in return you get some support, possibly including a subsidy on your employer costs?
- can you continue to offer apprenticeships outside the scheme?
- what are the certifiable skills that DIUS anticipate that an apprentice in the RH will develop?
- How would the support mechanisms for the apprentice work given the small size of the Household as an employer?

Constitutional Settlement Division  
Ministry of Justice

Tel  
Fax

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4

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**From:**  
**Sent:** 15 October 2008 15:51  
**To:**  
**Subject:** re: Apprenticeships - draft letter to the Palace on Apprenticeships 03-10-2008

No concerns with the draft on my part.

Thanks,

Policy Adviser  
DIUS Policy Pool/ Apprentices Programme

---

**From:**  
**Sent:** 15 October 2008 15:47  
**To:**  
**Cc:**  
**Subject:** Apprenticeships - draft letter to the Palace on Apprenticeships 03-10-2008

<< File: draft letter to the Palace on Apprenticeships 03-10-2008.DOC >>

has passed to me the letter prepared by to the Palace,  
and I have made some comments in track changes in the attached document.  
Would you be able to have a look at them and let me know if you agree,  
before we send it back to Also, I was not sure if you were happy with  
her draft, or if you were waiting for and I to comment first.

I look forward to hearing from you.

Legal Adviser's Office  
Department for Innovation, Universities and Skills  
Kingsgate House, Victoria Street, London SW1E 6SW

8

-----Original Message-----

From:

Sent: 28 January 2009 16:05

To:

Apprenticeships Unit;

Subject: FW: Apprenticeships

Here's the official letter from the Palace setting out their position in relation to the apprenticeships legislation.

Legal Adviser's Office

Department for Innovation, Universities and Skills Kingsgate House, Victoria Street,  
London SW1E 6SW

Tel:

-----Original Message-----

From:

Sent: 28 January 2009 15:09

To:

Cc:

Subject: FW: Apprenticeships

I've got the Palace to send this to me electronically.

Constitutional Settlement Division

Ministry of Justice

-----Original Message-----

From:

Sent: 28 January 2009 10:02

To:

Subject: FW: Apprenticeships

Dear

has asked me to pass on an electronic copy of his letter to you of 22nd January. Please find the word document attached here.

Thank you and kind regards,

Buckingham Palace  
London SW1A 1AA

Telephone:  
Internal Exts  
London Fax:

----- Original Message -----

From:

To:

Sent: Wed Jan 28 09:18:58 2009

Subject: Apprenticeships

Thank you for your letter about this. Could you send it to me electronically - the word document will be fine - as that is easier for me to distribute and file with the other papers? Thanks.

Constitutional Settlement Division  
Ministry of Justice

Tel



**From:**  
**Sent:** 15 October 2008 15:47  
**To:**  
**Cc:**  
**Subject:** Apprenticeships - draft letter to the Palace on Apprenticeships 03-10-2008

<< File: draft letter to the Palace on Apprenticeships 03-10-2008.DOC >>

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I look forward to hearing from you.

Legal Adviser's Office  
Department for Innovation, Universities and Skills  
Kingsgate House, Victoria Street, London SW1E 6SW  
Tel:

(11)

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**From:**  
**Sent:** 16 October 2008 12:48  
**To:**  
**Cc:**  
**Subject:** RE: Apprenticeships - draft letter to the Palace on Apprenticeships 03-10-2008

Sorry, I missed the DN re changes - revised version, attached.  
Will ring to discuss issue of Crown employment.

Regards,

Department for Innovation, Universities and Skills

Sheffield  
S1 4PQ  
Tel:  
Ext:  
Mobile:



draft letter to the  
Palace 161...

---

**From:**  
**Sent:** 16 October 2008 12:21  
**To:**  
**Cc:**  
**Subject:** RE: Apprenticeships - draft letter to the Palace on Apprenticeships 03-10-2008

<< File: draft letter to the Palace 161008.DOC >>

Thanks for your comments on my amendments. I have amended the letter in light of them, and in particular, have tried to clarify the "crown employment" point, and have moved the paragraph on whether Royal Household staff are Crown servants to follow on from that discussion. My first note sets out what I have done, and there's a second note for you to consider.

Let me know what you think when you have a moment. It can wait until after the briefing is prepared I am sure.

Legal Adviser's Office  
Department for Innovation, Universities and Skills  
Kingsgate House, Victoria Street, London SW1E 6SW  
Tel: \

---

**From:**  
**Sent:** 16 October 2008 10:54  
**To:**  
**Cc:**

**Subject:** RE: Apprenticeships - draft letter to the Palace on Apprenticeships 03-10-2008

<< File: draft letter to the Palace on Apprenticeships 03-10-2008 (2).DOC  
>>

Department for Innovation, Universities and Skills

Sheffield  
S1 4PQ  
Tel:  
Ext:  
Mobile:

---

**From:**  
**Sent:** 16 October 2008 10:50  
**To:**  
**Cc:**

**Subject:** RE: Apprenticeships - draft letter to the Palace on Apprenticeships 03-10-2008

The revised draft isn't attached, could you please resend it?

the draft when I see your latest version.

I can amend

**From:**  
**Sent:** 16 October 2008 10:17  
**To:**  
**Cc:**

**Subject:** RE: Apprenticeships - draft letter to the Palace on Apprenticeships 03-10-2008

I have responded to your DN's.- attached. I presume the DQs are for MoJ colleagues. I am sorry I do not understand d DN at end of para 3.

Please see comments and my response.

Department for Innovation, Universities and Skills

Sheffield  
S1 4PQ  
Tel:  
Ext:  
Mobile:

**From:**  
**Sent:** 15 October 2008 15:47  
**To:**

**Cc:**

**Subject:** Apprenticeships - draft letter to the Palace on Apprenticeships 03-10-2008

<< File: draft letter to the Palace on Apprenticeships 03-10-2008.DOC >>

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to the Palace, and I have made some comments in track  
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a look at them and let me know if you agree, before we send it  
back to Also, I was not sure if you were happy with her  
draft, or if you were waiting for and I to comment first.

I look forward to hearing from you.

Legal Adviser's Office  
Department for Innovation, Universities and Skills  
Kingsgate House, Victoria Street, London SW1E 6SW  
Tel:

**From:**  
**Sent:** 16 October 2008 12:21  
**To:**  
**Cc:**  
**Subject:** RE: Apprenticeships - draft letter to the Palace on Apprenticeships 03-10-2008



draft letter to the  
Palace 161...

Thanks for your comments on my amendments. I have amended the letter in light of them, and in particular, have tried to clarify the "crown employment" point, and have moved the paragraph on whether Royal Household staff are Crown servants to follow on from that discussion. My first note sets out what I have done, and there's a second note for you to consider.

Let me know what you think when you have a moment. It can wait until after the briefing is prepared I am sure.

Legal Adviser's Office  
Department for Innovation, Universities and Skills  
Kingsgate House, Victoria Street, London SW1E 6SW  
Tel:

**From:**  
**Sent:** 16 October 2008 10:54  
**To:**  
**Cc:**  
**Subject:** RE: Apprenticeships - draft letter to the Palace on Apprenticeships 03-10-2008

<< File: draft letter to the Palace on Apprenticeships 03-10-2008 (2).DOC >>

Department for Innovation, Universities and Skills  
Sheffield

S1 4PQ

Tel:

Ext:

Mobile:

---

**From:**  
**Sent:** 16 October 2008 10:50  
**To:**  
**Cc:**  
**Subject:** RE: Apprenticeships - draft letter to the Palace on Apprenticeships 03-10-2008

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I can amend  
the draft when I see your latest version.

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**From:**  
**Sent:** 16 October 2008 10:17  
**To:**  
**Cc:**  
**Subject:** RE: Apprenticeships - draft letter to the Palace on Apprenticeships 03-10-2008

I have responded to your DNs.- attached. I presume the DQs are for MoJ colleagues. I am sorry I do not understand d DN at end of para 3.

Please see comments and my response.

Department for Innovation, Universities and Skills

Sheffield  
S1 4PQ  
Tel:  
Ext:  
Mobile

Missing  
info.

1/2

---

**From:**

**Sent:** 06 January 2009 15:30

**To:**

**Cc:**

**Subject:** RE: Apprenticeships Bill : application to the Royal Household and the Duchy of Cornwall

Thanks for the update, and we look forward to hearing from you when you hear further from the Royal Household.

Legal Adviser's Office

Department for Innovation, Universities and Skills

Kingsgate House, Victoria Street, London SW1E 6SW

Tel:



**Appendix L**

**Office of Parliamentary Counsel**

**“Queen’s or Prince’s Consent”**

**“Crown Application”**

## QUEEN'S OR PRINCE'S CONSENT

---

These notes are intended for members of the Office of the Parliamentary Counsel.

The Pamphlet takes account of practice as at 15 November 2010. Please let the Know-How Counsel know of any developments and they will be published in the next Information Bulletin and then included in the next revision of the Pamphlet.

References to Erskine May are to the 23rd edition (2004). References to the Companion to the Standing Orders are to the 22nd edition of *The Companion to the Standing Orders and Guide to Proceedings of the House of Lords* (2010).

The Office Pamphlets, Information Bulletins, 1st PC circulars and other circulars referred to can be found on the PCO intranet.

*Office of the Parliamentary Counsel*

*15 November 2010*

## QUEEN'S OR PRINCE'S CONSENT

### CONTENTS

A: Introduction .....	1
B: Queen's consent .....	1
C: Prince's consent .....	6
D: General exceptions .....	10
E: The signification of consent .....	12
G: Miscellaneous .....	18
Appendix .....	22

## Queen's or Prince's Consent

### A: Introduction

1 The purpose of this pamphlet is to try to set out some of the issues that need to be considered when deciding whether Queen's or Prince's consent should be signified to a bill.<sup>1</sup>

2 The question of whether Queen's or Prince's consent should be signified is one of the things that we need to discuss with the House authorities before the bill is introduced. We also need to consider, as the bill goes through Parliament, whether any amendments to it will alter what has been decided.

3 Our responsibility is to bring anything in a bill that might require consent to the attention of the House authorities and to provide them with advice (so far as we are able) as to whether consent is in fact required. However, ultimately, the decision as to whether consent is required is for the House authorities.

### B: Queen's consent

4 Queen's consent is likely to be needed for –

- provisions affecting the prerogative; and
- provisions affecting the hereditary revenues, personal property or personal interests of the Crown, the Duchy of Lancaster or the Duchy of Cornwall.

5 Consent is not needed nowadays for provisions affecting Crown servants such as Ministers of the Crown or the armed forces (except possibly employees of the Royal Household) or property belonging to them as Crown servants (for example, the property of a government department).<sup>2</sup>

6 It is, though, not always easy to identify the type of provisions that might trigger the need for Queen's consent.

#### *Provisions affecting the prerogative*

7 The royal prerogative is defined in Halsbury's Laws<sup>3</sup> "as being that special pre-eminence which the monarch has over and above all other persons by virtue of the common law, but out of its ordinary course, in right of Her regal dignity, and includes all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England."

8 The prerogative powers are now often exercised by Crown servants on behalf of the monarch rather than by the monarch in person. The prerogative (as commonly defined)

---

1. See Part E for the details of what amounts to signification of Queen's or Prince's consent to a bill.

2. See A29.13.18. For background, also see A29.13.10 (where concern was expressed whether any property of a government department might include hereditary revenues).

3. Volume 8(2), 4th Edition, para 367, based on Blackstone's *Commentaries of the Laws of England* I, p. 239.

therefore extends beyond those powers that are personal to the monarch (ie things that only the monarch can do such as appointing a Prime Minister).

9 The prerogative can also be seen, at least in part, as the residue of the monarch's legal authority<sup>4</sup> which has survived into modern times without being superseded by statute law or otherwise eroded. Prerogative powers often relate to the government of the country and are exercisable for the public good.

10 The Lord Privy Seal is on record as saying that "the government shares the view of Wade and Bradley, in their work on constitutional law, that it is not possible to give a comprehensive catalogue of prerogative powers".<sup>5</sup>

11 However, prerogative powers of government (whether, in practice, exercised personally by the monarch (with or without the advice of government Ministers) or exercised on Her behalf by government Ministers, officials or other bodies) include the following powers—

- to appoint a Prime Minister;
- to summon, prorogue or dissolve Parliament;<sup>6</sup>
- to give or refuse Royal Assent to bills;
- to legislate by prerogative Orders in Council (for example, in relation to the civil service) or by letters patent;
- to exercise the prerogative of mercy (for example, the power to pardon convicted offenders);
- to make treaties;
- to wage war by any means<sup>7</sup> and to make peace (including power over the control, organisation and disposition of the armed forces);
- to recognise states;
- to issue of passports and to provide consular services<sup>8</sup>;
- to confer honours, decorations and peerages; and
- to make certain appointments (including royal commissions).

12 The prerogative also embraces powers in relation to—

- the coinage;
- the jurisdiction of the Crown as a visitor of universities and Oxbridge colleges; and
- appeals to the Privy Council.

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4. *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508.

5. 568 HL Official Report (5th Series), 01.02.96, col 118WA: Wade and Bradley *Constitutional and Administrative Law* (Longmans, 11th Ed., 1993), p.264. The statement is repeated in the current edition (Bradley and Ewing *Constitutional and Administrative Law*, Longmans, 15th Ed., 2011) p.249. Given the date of this pamphlet, it will be seen that, as regards their imprints, academic publishers have followed the trend set by magazine publishers.

6. This will of course be curtailed by the Fixed-term Parliaments Bill in the 2010-2012 session.

7. There is some confusion here. In relation to the Chemical Weapons Bill 1995-1996, the Landmines Bill 1997-98 and the Cluster Munitions Bill 2009-2010 consent was given in respect of the prerogative alone in the Commons but in relation to prerogative and interests in the Lords. The Nuclear Explosions (Prohibitions and Inspections) Bill did not require consent as section 1(2) provides that section 1(1) does not apply to nuclear explosions carried out in the course of an armed conflict, and so the prerogative was not affected by the Bill.

8. See, for example, SCL's letter of 10.11.04 in connection with the Identity Cards Bill.

13 There are also other prerogative rights of the Crown which are more closely associated with the production of revenues. These include –

- the grant of royal charters;
- the mining of precious metals;
- the grant of franchises for markets;
- the right to *bona vacantia*;<sup>9</sup>
- the right to waifs<sup>10</sup> and estrays<sup>11</sup>;
- the right to wrecks;
- the ownership of swans and whales.

14 The revenues from these tend to be included among the hereditary revenues of the Crown and there is therefore some uncertainty as to whether they fall within the prerogative for the purposes of Queen's or Prince's consent. It may be that an interest-only consent is sufficient to cover these vestigial prerogatives but, at the end of the day, this is for the House authorities to decide.<sup>12</sup>

15 In the context of the prerogative, it is also worth mentioning a confusing passage in Erskine May<sup>13</sup> which talks about "bills affecting the prerogative (being powers exercisable by the Sovereign for the performance of constitutional duties on the one hand, or, hereditary revenues, personal property or interests of the Crown, the Duchy of Lancaster or the Duchy of Cornwall on the other)".

16 This passage appears to contain a wider than usual definition of the prerogative. The second limb of the definition is not normally included in a definition of the prerogative at all and, if it were so included, the distinction drawn between prerogative only consent, interest only consent and prerogative and interest consent for the purposes of Queen's or Prince's consent (see Part E below) would be lost. As for the first limb of the definition, the description seems unnecessarily narrow in that, if nothing else, some matters are better described as part of the prerogative of government rather than powers exercisable for the performance of constitutional duties. The terminology used in Erskine May should therefore be treated with caution.

*Provisions affecting hereditary revenues, personal property or personal interests of the Crown, the Duchy of Lancaster or the Duchy of Cornwall*

17 The hereditary revenues of the Crown derive principally from land or other property which is, or becomes, vested in the monarch in right of the Crown (ie as monarch). It does not generally include revenue from the land and property of government departments.

18 The main example of the hereditary revenues is the revenues from the Crown Estate. The Crown Estate is worth £5.98 billion and consists of all the land and other property, rights and interests of the Crown which are under the management of the Crown Estate Commissioners (as established under the Crown Estate Act 1956 and managed in accordance with the Crown Estate Act 1961).

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9. See also the Appendix.

10. Things stolen and thrown away by a thief in flight.

11. Valuable animals of a tame or reclaimable nature found wandering and whose owner is unknown.

12. See A29.13.13.

13. At p.708.

19 The Crown Estate includes –

- the rural estate, consisting of 146,000 hectares of agricultural land and forest;
- the urban estate, including property on historic estates in London and elsewhere such as estates at Regent's Park and Kensington (but excluding the Royal palaces);
- the Windsor estate (including the Great Park and Ascot racecourse but excluding Windsor Castle);
- the marine estate consisting of about 55% of the UK's foreshore, tidal river-beds and almost all of the sea-bed within the 12 nautical miles limit (including rights to all minerals excluding hydrocarbons)<sup>14</sup>;
- rights to all naturally occurring gold or silver (the Mines Royal); and
- rights to all minerals (excluding hydrocarbons) from the UK's continental shelf.<sup>15</sup>

20 The Crown Estate as a whole essentially dates from 1066 although the ownership of some property can be traced back to Edward the Confessor. After the Norman Conquest, all the land in England belonged to William "in right of the Crown" because he was King. Over time, large areas were granted to nobles to raise revenue and the estate has fluctuated in size and value. An agreement was finally reached with George III that the Crown lands would be managed on behalf of the government and the surplus revenue would go to the Treasury. In return, the King would receive a fixed annual payment now known as the Civil List. This agreement has been repeated, at the beginning of his or her reign, by each succeeding monarch. Consideration is currently being given to the reform of the Civil List arrangements<sup>16</sup>; in the Spending Review 2010, it was announced that the Civil List would be replaced from 2013-14 by a sovereign support grant, linked to the revenues of the Crown Estate<sup>17</sup>. In 1603 James VI, King of Scotland, became James I, King of England and, although governed by separate legislation until the nineteenth century, the Crown Estate is now constituted so as to include regal property in Scotland<sup>18</sup>.

21 Treasure vesting in the Crown under the Treasure Act 1996 is treated as part of the hereditary revenues of the Crown for the purposes of section 1 of the Civil List Act 1952 (payment of hereditary revenues to the Exchequer). The Osborne Estate Act 1902 provided that the Osborne Estate<sup>19</sup> was to cease to be part of the private estates of the monarch and was to become, by virtue of the Act, vested in His Majesty in right of the Crown. The Osborne estate thus became part of the hereditary revenues of the Crown (the side-note to the operative section of that Act was "Osborne estate to be part of the hereditary revenues of the Crown").

22 The Duchy of Lancaster has a special status. Originating in a grant of land made in 1265 to a Plantagenet Prince, the Lancaster inheritance was raised to the status of a Duchy in 1351.

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14. Non-Crown owned foreshore, for this purpose, includes that part of the foreshore which is owned by the Duchies. In September 2010, the main board of the Crown Estate indicated that "The Crown Estate has long had a general pre-disposition against the sale of seabed in the interests of integrated and effective seabed management and that remains the case. The policy does however allow for consideration of individual proposals for sales depending on circumstances." The statement was made in the context of the potential development of Lerwick Harbour.

15. Annual Report of the Crown Estate Commissioners 2010

16. Report of the Royal Trustees 2010, (Session 2010-2-12, HC160). A short debate was held on progress on this matter in the House of Lords on 10th November 2010 on a motion by Lord Berkeley.

17. Spending Review 2010, (Cm.7942, 2010) paragraph 2.143. Obviously this will require primary legislation.

18. Indeed there are some rights, such as salmon fishings and the ownership of wild crustaceans (oysters and mussels) which only apply in relation to Scotland.

19. Queen Victoria's retreat on the Isle of Wight.

It merged with the Crown in 1399<sup>20</sup> and a charter of 1485 confirmed the Duchy as a distinct entity to be enjoyed by subsequent monarchs, separate from other Crown lands and under its own management. There has been no fresh settlement since then.

24 The Duchy currently manages approximately 18,800 hectares of land in England and Wales including the Savoy Estate off the Strand, 10 castles including Lancaster and Pickering castles and numerous rural holdings in Lancashire, Yorkshire, Staffordshire and elsewhere. The Queen holds the title of "the Duke of Lancaster"<sup>22</sup> and the Chancellor of the Duchy of Lancaster is a Cabinet Minister who, among other things, is responsible to the Queen for the administration of the Duchy. However, certain functions, particularly asset management, have been delegated to the Duchy Council. The revenues of the Duchy finance the Privy Purse which meets various expenses of the Queen including the maintenance of her private estates (Balmoral and Sandringham), charitable donations and Civil List deficiencies.

25 The Duchy of Lancaster is Crown land and Queen's consent is required if a bill affects its interests (there is no question of separate Prince's consent). However, although nothing turns on the point so far as Queen's consent is concerned, it is not entirely clear whether the revenues from it form part of the hereditary revenues of the Crown.<sup>23</sup>

26 For the Duchy of Cornwall, see Part C below about Prince's consent.

27 The private estates<sup>24</sup> of the Queen are an example of the personal property of the Crown. Section 1 of the Crown Private Estates Act 1862 defines them for the purposes of that

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20. In 1399, Henry Bolingbroke, Duke of Lancaster, became King. Originally, he provided for the inheritance to pass to his male heirs and for it to be administered separately from the other royal possessions. However, when Edward IV of York became King, he treated the Duchy as forfeit and legally his own despite the fact that he had no Lancastrian blood. By Act of Parliament, he incorporated the Duchy possessions under the title "the Duchy of Lancaster" to be held "for ever to us and our heirs, Kings of England, separate from all other Royal possessions". The accession of Henry VII united the houses of Lancaster and York.

22. "Duke" is still used even for a female monarch.

23. For example, it was not mentioned in the civil list arrangements first entered into by George III. This may be because, at the time, it was worth very little or it may be because it was not thought to form part of the hereditary revenues of the Crown.

24. See the Crown Private Estate Act 1800, the Crown Private Estates Act 1862 and the Crown Private Estates Act 1873.



Act as—

- land or other real or heritable property or estate purchased at any time by Queen Victoria or her heirs or successors out of money issued and applied for the use of the Privy Purse or out of any other money not appropriated to a public service,
- land or other real or heritable property or estate which came to Queen Victoria or her heirs or successors (whether by gift, inheritance or otherwise) from any other person (unless not intended to be transferred as private estate<sup>25</sup>),
- land or other real or heritable property or estate which belonged to, or was in trust for, Queen Victoria or her heirs or successors at the time of their accession and which was, before their accession, capable of alienation.

28 The private estates differ from the Crown Estate in that they can be freely disposed of and are not subject to the Civil List Acts. Section 8 of the Crown Private Estates Act 1862 ensures that the private estates are subject to taxes, rates, duties etc. as though they were the property of any subject of the realm but section 9 of that Act ensures that such impositions are paid out of the Privy Purse. Balmoral and Sandringham are private estates of the Queen.

29 An example of the personal interests of the Crown is anything that affects the Queen personally (whether as an individual or as landlord or employer) and is not covered by any of the other categories for which consent is required.

30 Anything affecting the Royal Palaces where the Queen and Her family reside may be an example of something affecting the personal interests of the Crown. These palaces (for example, Buckingham Palace, St James' Palace and Windsor Castle) are retained as royal residences at the disposal of the monarch and are held by the Queen on trust as monarch for future monarchs.<sup>26</sup> The abolition of the coroner of the Queen's household by the Coroners and Justice Act 2009 required interest consent.<sup>27</sup>

#### *Exceptions and examples*

31 Part D deals with some general exceptions to the need for Queen's consent.

32 The Appendix contains examples of cases where consent has, or has not, been required in particular cases.

#### **C: Prince's consent**

33 Prince's consent is needed in certain circumstances for provisions affecting the Duchy of Cornwall. It may, very occasionally, be needed in other cases as well.

#### *The Duchy of Cornwall*

34 The Duchy of Cornwall was created in 1337 by Edward III for his son, Prince Edward (the Black Prince). A charter ensured that each future Duke of Cornwall would be the eldest surviving son of the monarch and the heir to the Throne. The current Prince of Wales is therefore also the Duke of Cornwall.

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25. Section 1 of the Crown Private Estates Act 1873.

26. It is worth noting that Queen's consent was required for the bill for the Parliamentary Corporate Bodies Act 1992 because the Palace of Westminster is a royal palace even though it is not a royal residence.

27. See letter from G Lyne to R Rogers, 12th October 2007.

35 However, there are circumstances in which there is no Duke of Cornwall and the Duchy reverts to the Crown. For example, Edward VIII had no son and so, on his accession, there was no Duke of Cornwall and the Duchy reverted to the Crown. Similarly, King George VI had no sons and so, on his accession, there was no Duke of Cornwall and the Duchy remained with the Crown. The Duchy also reverts to the Crown if the heir apparent dies leaving issue (because the heir to the throne is not a surviving son of the monarch).

36 It is this reversionary interest of the Crown in the Duchy of Cornwall which means that a bill affecting the hereditary revenues, personal property or interests<sup>28</sup> of the Duchy requires Queen's consent. It should be remembered that the Duchy currently owns 54,090 hectares of land scattered across 23 counties (including commercial property in London).

37 Queen's consent alone is required if there is no Duke of Cornwall or if the Duke of Cornwall is not yet of age.<sup>29</sup>

38 If the Duke of Cornwall is of age, Prince's consent is required as well as Queen's consent for provisions that expressly mention the Duchy or otherwise have a special application to it.<sup>30</sup>

39 Provisions that merely affect the Duchy in the same way as other Crown land do not generally seem to need Prince's consent as well as Queen's consent. The rationale seems to be that, in such cases, Queen's consent is taken to include consent on behalf of the Prince of Wales.

40 Thus, for example, paragraph 8.185 of *The Companion to the Standing Orders and Guide to the Proceedings of the House of Lords* states that no separate Duchy consent is required if Queen's consent has been obtained and the effect on the Duchy is not distinct from that on the Crown.

41 Similarly, JSF wrote in 1970 in connection with the Fire Precautions Bill to the Clerk of Public Bills in the House of Commons –

"I seem to remember Perceval saying once in conversation that the Prince's consent was only called for if the Bill mentioned the Duchy or otherwise had some special application to it."

42 This rule was reaffirmed in connection with the Animal Welfare Bill 2005. There was a suggestion that this rule only applied in the House of Lords where the bill affected the prerogative and Queen's consent is signified on second reading<sup>31</sup> but the Lords Public Bill Office seem to have accepted on that bill that the rule is wider than this and applies whatever the form of consent and the occasion on which it is signified.<sup>32</sup>

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28. See HC Deb. 30.04.96 W.A.417.

29. Erskine May at p.708, merely refers to the Duke of Cornwall being "of age". It is not entirely clear what this means. Once the Duke of Cornwall is 18, he acquires powers to act in relation to the Duchy although there is also a suggestion that he does not receive the full income of the Duchy until he is 21.

30. Very occasionally, the Queen's interest may be considered too remote to justify Queen's consent but the Prince's interest may be considered pressing enough to require Prince's consent. See A29.13.24 where Prince's consent alone was signified for the Pilotage Bill 1987 because the Duke of Cornwall is the harbour authority for the Scilly Isles. There must, though, be doubts about the logic of this decision.

31. See email from John Sellers to Helene Moore of 14.10.05 on the Animal Welfare Bill. This more limited rule appears to have been relied upon for the decision not to signify Prince's consent in relation to the bill for the Human Rights Act 1998 (note to file by Ed Ollard 04.11.97). At the time Edward Caldwell suggested that the rule might also apply for third reading consents but it was agreed that any decision on second reading consents would not affect practice on third reading consents. In fact, practice on third reading consents appears to have been similar in any event.

43 Other examples of bills affecting Duchy lands for which Queen's consent has been given on third reading but Prince's consent has not been given include the bills for the Rating (Valuation) Act 1999 and the High Hedges Bills 2000/01 and 2002/03.<sup>33</sup>

44 A possible exception to this rule might be a case where Prince's consent has been signified (or would have been signified if he were of age) in relation to an earlier bill because of an express mention of the Duchy in the bill and a later bill has come along in the same field and applies equally to the Duchy but without any express mention of it. In these circumstances, the House authorities might consider it prudent to require the signification of Prince's consent simply to avoid MPs or peers puzzling over what has changed in the interim.

45 An example of this might be the Commons Bill 2006 where Prince's consent was signified even though there was no express mention of the Duchy or special application to it. However, Queen's consent had been signified in a way that drew attention to the Prince's interest in relation to the bill's predecessor, the bill for the Commons Registration Act 1965, because of an express reference in section 23 of that Act to the Duchy. This may well have been the reason why Prince's consent was also thought to be appropriate in relation to the Commons Bill.

#### *The Prince and Steward of Scotland*

46 Consent as Prince and Steward of Scotland has always been very rare and it is possible that it has now been superseded altogether.

47 The styles "Prince and Great (or High) Steward of Scotland" appear to be inseparably connected. The Great (or High) Steward of Scotland is a hereditary office dating from the twelfth century. An Act of 1469 confirmed that the title should go to "the first-born prince of the King of Scots for ever". The designation "Principality of Scotland" implies not Scotland as a whole but the lands in Renfrew and the Stewartry appropriated as the patrimony of the monarch's eldest son for his maintenance.<sup>34</sup>

48 Prince's consent was given in relation to the bill for the Conveyancing and Feudal Reform (Scotland) Act 1970 "as far as the Prince of Wales's interest, in respect of the Principality and Stewartry of Scotland, is concerned".<sup>35</sup> Section 51 of that Act applied the Act to "land held of the Prince and Steward of Scotland".

49 It was also given in relation to the bill for the Land Registration (Scotland) Act 1979 "so far as the interest of the Prince of Wales in respect of the Principality and Stewartry of Scotland is concerned".<sup>36</sup> Section 26 of that Act applied the Act to "land held of the Crown and of the Prince and Steward of Scotland".

50 These were exceptional cases relating to Scottish land law and feudal reform in Scotland. The need for the consent of the Prince and Steward of Scotland appears to have been an extension of the need for Queen's consent in relation to Crown land (similar to the extension required for the Duchy of Cornwall). Thus, the Prince and Steward of Scotland held

32. See Information Bulletin of 21.10.05 and the related correspondence on the Animal Welfare Bill: email from John Sellers to Helene Moore of 14.10.05, letter of Helene Moore to Lords PBO of 14.10.05 and reply of Lords PBO of 17.10.05. See also A29.13.17. In addition, a letter of Geoffrey Bowman of 27.11.98 on the Rating (Valuation) Bill records advice from the Commons applying the wider rule to third reading consents.

33. See letter of Helene Moore to Lords PBO of 14.10.05 on the Animal Welfare Bill.

34. See Stair, "The Laws of Scotland", Vol 7, para. 786.

35. See CJ 1969-70 p.321.

36. See CJ 1978-79 p.259.

residual Crown lands in Scotland in lieu of the monarch and, in particular, held feudal superiorities of certain land, mostly in the south-west of Scotland.

51 However, it is fair to say that the need for such consent was always very rare even when the Prince and Steward of Scotland held feudal superiorities in Scotland. The Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) has now abolished any feudal estate (for example, a superiority) held by the Prince and Steward of Scotland that was not a dominium utile (the equivalent of ordinary ownership of land). The result is that it is no longer clear whether there are any remaining land or interests held by the Prince of Wales as Prince and Steward of Scotland.

52 If there is no such land, there is no residual scope for Prince's consent as the Prince and Steward of Scotland. And, even if there is any such land, the fact that land and feudal reform has been devolved to the Scottish Parliament makes it even more unlikely that Prince's consent as the Prince and Steward of Scotland will ever be relevant to future Westminster bills.

53 In addition, on the same principles as for Duchy of Cornwall land, consent as Prince and Steward of Scotland is only ever likely to be an issue if a bill specifically mentions the Prince and Steward of Scotland or has some special application to him. Queen's consent is likely to be sufficient for any bill that affects Crown land (including any land held by the Prince and Steward of Scotland) but does not mention, or have any special application to, the land held by the Prince and Steward of Scotland.

54 The question of the consent of the Prince and Steward of Scotland presumably also cannot arise at all if he is not of age or there is no separate Prince and Steward of Scotland (for example, there was no Great (or High) Steward of Scotland from the accession of Edward VIII to the birth of Prince Charles because there was no first-born prince of the King). In these circumstances, Queen's consent is, again, presumably taken to be sufficient.

*Prince's consent in other circumstances*

55 Prince's consent is generally only required because of the Prince of Wales's role as Duke of Cornwall (or, very occasionally, as the Prince and Steward of Scotland).

56 These consents derive from the Crown's own interest in land and are therefore an extension of Queen's consent.

57 Generally, it follows from this that there is no question of needing Prince's consent for any provision of a bill that affects the Prince of Wales in his capacity as an ordinary citizen. Thus, for example, any bill that creates criminal offences will bind the Prince of Wales and will not require the Prince's consent to do so.

58 However, very occasionally, it may be thought to be appropriate to require Prince's consent in its own right even though there is no connection to the land interests of the Crown by virtue of the Prince's role as Duke of Cornwall or Prince and Steward of Scotland.<sup>37</sup>

59 For example, the bill for the House of Lords Act 1999 (which removed the bulk of hereditary peers from the House of Lords) expressly provided that "hereditary peerage" included the principality of Wales. This was to make it absolutely clear that the Prince of Wales was excluded from the House of Lords as Prince of Wales (there was some doubt as to

37. This is despite letter from John Fiennes to the Commons PBO of 13.11.70 and letter from Geoffrey Bowman to DoE of 27.11.98.

whether the terms of the grant of the principality of Wales were such as to make it a hereditary peerage). In these circumstances, Prince's consent was required irrespective of any connection that the bill might have had to the Dukedom of Cornwall or to property rights of the Prince and High Steward of Scotland. Similarly, Prince's consent was required for the application of data protection legislation expressly to data processed by the Royal Household and the Duchy of Lancaster such a case is likely to be extremely rare.

#### *Exceptions and examples*

60 Part D deals with some general exceptions to the need for Prince's consent.

61 The Appendix contains examples of cases where consent has, or has not, been required in particular cases.

#### **D: General exceptions**

62 There are some general exceptions to the need for Queen's or Prince's consent.

#### *The remoteness/de minimis tests*

63 Queen's or Prince's consent is not needed where the impact on the Crown is too indirect or too remote. This will include cases where there is unlikely to be any impact or any impact is likely to be too insignificant. There is, therefore, an overlap between this test and a de minimis test and the two tests tend to become blurred in practice. They are therefore best considered together.

64 An example of the remoteness test being applied is in connection with the bill for the Local Government Act 1999. Geoffrey Bowman argued<sup>38</sup> that the effect of new capping provisions on the Queen's liability to council tax was too remote or indirect for consent to be required (the Queen is subject to council tax because of section 8 of the Crown Private Estates Act 1862 and section 65A of the Local Government Finance Act 1988). The argument was accepted and Queen's consent was not given on the bill.

65 Similarly, on the bill for the Greater London Authority Act 1999, Robert Parker argued that the effect of the bill was too remote for Queen's consent to be required because, although the bill made the GLA a major precepting authority and so there was a possibility that the Queen's council tax bill might be higher, the effect was unlikely to be significant because many of the functions of the GLA and the four functional bodies for which it also issued precepts were to be taken over from existing bodies already funded by the council tax. This argument, which might as easily have been put as a de minimis argument, was accepted.<sup>39</sup>

#### *Original consent sufficient for later provisions*

66 Sometimes, Queen's or Prince's consent is not needed for a bill if an earlier consent is deemed to be sufficient for the purposes of the bill. This can arise in a number of different ways.

67 For example, Queen's or Prince's consent given at the time of an original change in the law may be deemed to be sufficient for the purposes of a new bill amending that law if the

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38. Letter of 17.11.98.

39. See letter of Robert Parker of 30.04.99.

amendments can be taken to fall within the scope of the original consent. Thus, if Queen's or Prince's consent has been given in the past for a particular legislative scheme, it may be possible to argue, on occasion, that no further consent is required for a bill that makes only a minor change to that scheme if it appears likely that the original consent would have encompassed consent for changes of this nature.

68 An example of this is the introduction of the VAT regime. The introduction of this tax required Queen's consent<sup>40</sup> but, although any substantial restructuring of VAT might necessitate further Queen's consent, changes in the tax not amounting to this do not.

69 Thus, George Engle records in a note of 18th April 1975<sup>41</sup> a discussion with the Clerk of Public Bills whether consent was needed for a clause to impose a higher rate of VAT on goods and services –

"Mr Birley .... agrees that Queen's consent is not needed for run of the mill amendments, on the footing that the Crown has, with the Queen's consent, been placed once and for all in the same position as other suppliers by FA 1972 s.19. But, if it is proposed to effect any substantial restructuring of the tax, or (of course) to amend section 19, then the question of Queen's consent should be discussed with the Public Bill Office."

70 Similarly, on the bill for the Sustainable and Secure Buildings Act 2004, neither Queen's nor Prince's consent was required for amendments to the building regulations regime because the amendments were not thought to be significant enough to require any new consent given that consent to the principle that building regulations should generally apply to the Crown had already been given on previous legislation and that the amendments did not fundamentally alter the nature of building regulations.<sup>42</sup>

71 On the other hand, on the bill for the Housing Act 1996, it was decided that Queen's consent was needed for amendments to landlord and tenant law because the amendments were significant and did affect the Crown.<sup>43</sup>

72 Similarly, on the European Union Bill 2004, it was decided that Queen's consent would need to be signified on second reading because, although Queen's consent was needed for the bill for the European Communities Act 1972, the House authorities felt that the reworking of that Act by the bill was substantial enough to require second reading consent again.<sup>44</sup>

73 It is therefore important not to place too much weight on the argument that minor tinkering to a regime that already has Queen's or Prince's consent does not itself require Queen's or Prince's consent. The House authorities will look at each case on its merits and the argument cannot be pushed too far.

74 Another example of a case where the original Queen's or Prince's consent is deemed to be sufficient is where there is a simple restatement of the existing law. In such a case, there is no need for a fresh Queen's or Prince's consent. The result is that, in the case of a consolidation or a rewriting of legislation, the question of Queen's or Prince's consent only arises at all in relation to any changes in the law made by the consolidation or rewrite. And such changes might often be so minor that they can, in any event, be treated as falling within the scope of the original consent.

40. It applies to taxable supplies by the Crown: see section 41 of the Value Added Tax Act 1994.

41. See A29.13.21.

42. See letter of Richard Marlin to Malcolm Jack of 13.01.04.

43. See A29.13.29. But note, for example that the amendments of housing legislation made by the bill for the Civil Partnership Act 2004 were not thought to be significant enough to warrant Queen's consent.

44. See the email of Nick Sheppard to Doug Wilson of 03.11.04 on the European Union bill archive.

75 Or, again, consent may be required to legislate in a prerogative area but, if the legislation removes the prerogative altogether from that area, then no further consent is likely to be required on the grounds of the prerogative in connection with a bill to alter that legislation and make a different legislative scheme in the area formerly covered by the prerogative. In this case, the original statutory provisions are sufficient to remove the prerogative and the original consent can be taken to permit further legislation in that area.<sup>45</sup> However, sometimes, there might be arguments as to whether the prerogative has fully been removed in a particular area.<sup>46</sup>

76 Or, again, consent may have already been signified on a bill during its passage through one House and it may be possible to conclude that no further consent is required to be signified by that House when considering subsequent amendments made to the bill (whether amendments made by that or the other House) because the original consent given was sufficient (see Part E below).

#### *No adverse effect on the Crown*

77 It is sometimes argued that there is no need for Queen's or Prince's consent if there is no adverse effect on the Crown or the Duchy of Cornwall. And there is a certain logic to this. After all, it is something of a nonsense to require consent for something that is wholly beneficial to the Crown.

78 However, the doctrine that no consent is required if there is no adverse effect is not fully established. Thus, for example, on the bill for the Rating (Former Agricultural Premises and Rural Shops) Act 2001, the Clerk of Legislation in the House of Commons indicated that, of the reasons given why Queen's consent might not be required, he was less convinced by the argument that consent is not needed for a bill that affects the Queen in a beneficial way.<sup>47</sup>

79 It is also fair to say that, in practice, this doctrine is often blurred with the remoteness test or the de minimis test. For example, if the Crown benefits from a provision, then (unless the benefit is really substantial) the impact on it begins to look remote or de minimis, ie it hardly matters.

80 In addition, part of the difficulty with an adverse test lies in deciding whether or not something is, in fact, beneficial, or wholly beneficial, to the Crown. Where this is a matter of opinion on which reasonable people might differ, it may well be reasonable to err on the side of caution and require consent even if the government's view is that there is a benefit to the Crown.

### **E: The signification of consent**

#### *Signification in both Houses*

81 Queen's or Prince's consent must be signified in both Houses of Parliament.

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45. See, for example, the 1st PC circular of 23.12.99 in relation to the Disqualifications Bill. The ruling on the Jamaica Independence Bill 1962 on A29.13.08 can be distinguished because this seems to have been on the basis that some element of prerogative was still left in this case ("taking a broad view").

46. See A29.13.11 (letter of 30.10.67) for doubt expressed as to how far the statutory regulation of powers turns powers that are non-statutory in origin into statutory powers.

47. See also, for example, A29.13.29.

*Signification at second or third reading*

82 Queen's or Prince's consent is normally signified at the third reading of a bill in the House of Commons.

83 However, it will be signified at second reading in the House of Commons if the provisions in question fundamentally affect the prerogative, hereditary revenues, personal property or interest of the Crown. This avoids the House taking a bill through all its main stages before discovering that consent is not forthcoming and so a major plank of the bill must be removed.<sup>48</sup>

84 The rule is the same in the House of Lords but, in addition, *The Companion to the Standing Orders of the House of Lords*<sup>49</sup> suggests that the stage at which signification is required in the House of Lords will depend on whether it is the interest or the prerogative of the Crown that is affected.

85 *The Companion* and Erskine May<sup>50</sup> now march in step in stating that consent is "normally" signified at second reading where the Bill affects the prerogative of the Crown

86 The exceptions to the rule that a prerogative consent must be signified at second reading in the House of Lords are not entirely clear but there does, at least, appear to be an informal exception for bills that touch on the prerogative "only slightly"<sup>51</sup> although this is not mentioned in either *The Companion* or in Erskine May.<sup>52</sup>

87 In the context of deciding at what stage prerogative and interest consent should be signified in relation to the Child Maintenance and Other Payments Bill (2006/07), Tom Mohan doubted that the statement at p.709 of Erskine May that "if a bill affects the prerogatives of the Crown, consent is normally signified at second reading" is quite right (though, as noted above, that is now also what the most recent edition of *The Companion* says). He thinks that second reading signification is required where the matters affecting the prerogative are fundamental to the bill/- but in a case such as this Bill, where they are not, third reading signification is sufficient. He is going to suggest that the statement at p.709 is revised in the next edition.<sup>53</sup>

88 If a bill affecting the prerogative more than slightly is given Queen's consent at second reading in the House of Lords, the Commons will follow the Lords procedure when the bill comes down from the Lords and require Queen's consent to be signified on second reading (even if their own procedure would have produced a different result).<sup>54</sup>

89 Queen's or Prince's consent is signified in the House of Commons on the order for

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48. For example, in the 2010-12 session, Queen's consent was signified on Second Reading in relation to the Fixed-term Parliaments Bill (HC Deb. Vol. 511, col.621) and will be signified on Second Reading of the European Union Bill.

49. At para. 8.186.

50. At p.709

51. For a reference to this rule, see letter of HC to Tom Mohan of 03.03.04 in connection with the Civil Partnership Bill although, in this case, no-one seriously expected that consent would be needed on second reading and Tom Mohan did not discuss the discrepancy between the rule and what was then said in the Companion.

52. For another example of a bill for which prerogative consent was signified on third reading in the House of Lords, see the bill for the Higher Education Act 2004 (which was introduced in the House of Commons).

53. See the Information Bulletin of 02.07.07.

54. See A29.13.27.



second or third reading being read and is signified in the House of Lords immediately before the motion for second or third reading is made.

*Signification following amendments to a bill*

90 Consent may sometimes need to be signified, or further signified, as a result of amendments to a bill.

91 For example, a bill may not have needed consent in the form in which it was introduced in, or transferred to, a House but may need it as a result of amendments made to it during its passage through the House. If so, the Palace needs to be approached for consent before the amendments are tabled and the relevant consent will usually be signified on third reading.

92 Alternatively, a bill may have needed consent in the form in which it was introduced in, or transferred to, a House but amendments made to it during its passage through that House may be of a kind that also requires consent. In these circumstances, the department must consider whether the terms of the consent obtained from the Palace are sufficient to cover the subsequent amendments.<sup>55</sup>

93 If they are sufficient to cover the subsequent amendments, the necessary consent can simply be signified for everything on third reading in the House. Or, if the consent has already been signified on second reading before the amendments were made, the House may well treat this consent as being wide enough to frank the subsequent amendments.

94 But, if the terms of the original consent are not sufficient to cover the subsequent amendments, the department must obtain the Palace's further consent before the amendments are tabled in the House. A combined consent can then be signified at third reading (ie for the bill as introduced or transferred and for the subsequent amendments to it) or, if the consent for the bill as introduced or transferred was signified at second reading, a further consent may need to be signified at third reading for the subsequent amendments.

95 Further problems can arise in relation to the first House when the second House amends a bill and the first House has to consider its amendments.

96 In this case, two main scenarios are possible—<sup>56</sup>

- no consent was signified in the first House but amendments made to the bill by the second House mean that consent needs to be signified when those amendments are considered by the first House;
- consent was signified in the first House but amendments made to the bill by the second House mean that further consent needs to be signified in the first House.

97 In the case of the second scenario, no further consent will generally need to be signified unless the amendments made by the second House have an effect on the Queen's interests or prerogative which, having regard to the bill's subject-matter, was unforeseen. An example would be the introduction of a topic sufficiently different from what was in the original bill as to imply that the original consent could not have extended to the new topic. For a full discussion of this, see Chapter 18 of the To and Fro Pamphlet.

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<sup>55</sup> See A29.13.25.

<sup>56</sup> It is also possible for consent to be needed at later stages in the "to and fro" process, for example, on a suggested compromise by one House to a proposal by another that did not itself require consent. See the 1st PC circular of 02.11.93.

98 On either scenario, consent will have been signified in the second House to cover the amendments and so the department will already have obtained consent from the Palace for the amendments or, on the second scenario, concluded that the terms of the original consent were wide enough to cover the subsequent amendments.

#### *Signification at other stages*

99 In theory, Queen's consent can also be signified at other stages in a bill's progress. Thus, for example, Queen's consent has been given to bills about to be considered in committee. However, it cannot be signified in committee itself because committees cannot receive messages from the Crown and it is for the House as a whole to consider the monarch's interests.<sup>57</sup>

#### *Re-signification for identical bill*

100 It is worth noting that, although Queen's or Prince's consent may have been signified for a bill that has been introduced but not passed in one session, it still needs to be signified again for the same bill re-introduced in the next session and the Palace needs to be approached again to confirm its original consent.<sup>58</sup> This follows from the fact that the formula for consent operates only for the purposes of the bill in relation to which consent is being given. Re-signification may also be necessary if consent has been signified in one session and the bill is then carried over into the next session.<sup>59</sup>

#### *The manner of signification*

101 In the House of Commons, consent will be signified by a Privy Counsellor who is almost invariably a serving Minister of the Crown. Consent to public bills in the House of Commons has, on rare occasions, been signified by a Privy Counsellor who is not a serving Minister of the Crown but this is acceptable only if the Privy Counsellor is in a position to give assurance that the consent has indeed been obtained.<sup>60</sup>

102 If consent is signified at second reading, it is done orally. If it is done at third reading, it is done formally (by nodding in response to a request from the Chair).

103 In the House of Lords consent will be signified by a Privy Counsellor who must be a serving Minister of the Crown.<sup>61</sup> It is done orally (whether at second or third reading).

104 The department (through their Parliamentary branch) are responsible for ensuring that a Privy Counsellor is available to signify consent in either House.

105 When Queen's Consent is to be signified at second or third reading in the Commons, the Order paper, when setting out the Main Business for the day in question, lists beside the name of the bill –

- “(Queen's Consent to be signified)” in the case of Second Reading, or
- “(Queen's Consent to be signified on Third Reading)”.

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57. See Erskine May at p.709.

58. See email of Ingrid Meldal-Johnsen of 24.04.05 on the European Union Bill archive. See also A29.13.07 where the question was considered although, in fact, consent was applied for again on the basis that there might be differences between the two bills. See also the Marine Navigation Aids Bills of 2009-2010 and 2010-2011.

59. See the bill for the Constitutional Reform Act 2005 and the Office Pamphlet on carrying over bills.

60. Erskine May at p.709. The Chairman of Ways and Means has signified consent to private bills.

61. Erskine May at p.709.

106 The question arose recently whether anything needs to be done by us, the Department or the Whips to ensure that listing appears. The answer is no - the clerks in the Public Bill Office in the Commons make a note at the time when the bill is introduced and make the entry as a matter of course<sup>62</sup>.

*The form of signification*

107 The form of the consent will vary depending upon whether the prerogative or interests (or both) of the monarch are affected.

108 We are not usually concerned with the precise form of words that is used. The necessary arrangements seem to be made between the department's parliamentary branch, the Whips and the House authorities. Our role is usually confined to telling the department what sort of consent is required (prerogative, interest or both) and when it needs to be signified.

109 However, any particular form of words used needs to be consistent with the terms of the consent given by the Palace even if the precise words used by the Palace were different. Thus, for example, if the Palace only gives a prerogative consent, the form of words must not refer to a prerogative and interest consent.

110 A third reading consent in the House of Commons will normally be recorded in the Journal<sup>63</sup> in the following form (in the case of a bill affecting both the prerogative and interest) –

“Mr [...], by Her Majesty's Command, acquainted the House, That Her Majesty, having been informed of the purport of the Bill, gives her Consent, as far as Her Majesty's prerogative and interest are concerned, That the House may do therein as it shall think fit.”

111 In Hansard, there will normally be a bare statement that Queen's consent has been signified.

112 A second reading consent in the House of Commons, at least in the case of recent government bills, appears to follow the same form as that used in the House of Lords (see below) and is recorded in full in the Journal and Hansard.

113 A second or third reading consent in the House of Lords will normally be recorded in the Journal by a bare statement that Queen's consent has been signified.

114 However, the consent is recorded in Hansard along the following lines (in the case of a bill affecting both the prerogative and interest) – <sup>64</sup>

“I have it in command from Her Majesty the Queen to acquaint the House that Her Majesty, having been informed of the purport of the [...] Bill, has consented to place her Prerogative and Interest, so far as they are affected by the Bill, at the disposal of Parliament for the purposes of the Bill.”

115 It is not clear whether a standard formula would be used to record what has happened

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62. See the Information Bulletin of 25.04.07.

63. In the case of the Child Maintenance and Other Payments Bill (2006/07), the Votes and Proceedings recorded that interest consent had been signified on third reading in the Commons but, in error, failed to refer to prerogative consent. The clerk (Chris Shaw) agreed to arrange for the bound volume of the Journal for session 2006/07 to record the signification of both types of consent. See Information Bulletin of 04/02/08.

64. See letter of Mackenzie of 10.11.60 on A29.13.05. This formula was, for example, used to signify Queen's consent on the second reading in the House of Lords of the Constitutional Reform Bill [*Lords*] (17.01.2005).

if different words were actually spoken in either House on the signification of consent. However, it may be possible to use the standard formula so long as it reflects the substance of what was actually said. But it is clearly preferable for the Privy Counsellor to use the right form of words in the first place.

116 Different words will, of course, be used in the Commons and the Lords for prerogative only and interest only consents, for cases where Prince's consent is also relevant and, possibly, for cases where the interests of the Duchy of Lancaster are specifically in the picture.

## **F: Practical steps in relation to Queen's or Prince's consent**

### *Obtaining consent*

117 The department sponsoring a bill is responsible for writing to the Palace at an early stage before the introduction of the bill to obtain Queen's or Prince's consent if it is required. The Palace must be given as much time as possible and never fewer than 14 days.

118 Para 18.7 of the *Guide to Making Legislation* (see [http://www.cabinetoffice.gov.uk/secretariats/economic\\_and\\_domestic/legislative\\_programme/guide\\_html/queens\\_consent.aspx](http://www.cabinetoffice.gov.uk/secretariats/economic_and_domestic/legislative_programme/guide_html/queens_consent.aspx)) states that, where consent is required, it should normally be sought and given before a bill is introduced and that PBL Committee will want an assurance that any necessary consent has been obtained before approving a bill for introduction.

119 In practice it may be unrealistic for consent to have been obtained before the PBL Committee meeting in all cases where consent is required at third reading. In such cases an assurance that the Palace has been approached or that the matter is in hand may be sufficient. But in cases where consent is required at second reading or the bill affects Her Majesty personally, PBL Committee are likely to expect (in all but exceptional cases) an assurance that consent has been obtained.

120 As regards the obtaining of Queen's consent, what actually happens is that the relevant departmental Minister writes to Her Majesty's Private Secretary explaining the purpose of the bill, the way it affects the Crown and asking for consent. Two copies of the draft bill must be enclosed.

121 Unless consent is required in relation to the prerogative only, copies of the letter, and two copies of the draft bill, are sent to the Private Secretary to the Prince of Wales, the Secretary to the Crown Estate Commissioners and Farrer and Co. (who will advise the Clerk to the Council of the Duchy of Lancaster and the Secretary of the Duchy of Cornwall about the nature of the legislation and the potential impact that it may have on Duchy operations or privileges). The Palace will not reply until they have received any comments which each of these authorities may have.

122 If Prince's consent is also being sought, the Minister may also write directly to the Private Secretary to the Prince of Wales.

123 We should do all that we can to give the department early warning of the need for Queen's or Prince's consent. However, this can cause difficulties because it can often mean that we are asked whether the bill needs Queen's or Prince's consent before all the provisions of the bill are drafted and before we have approached the House authorities on the question.

124 Sometimes, it will be clear, even at an early stage, that consent is required and what the form of consent should be. Sometimes, it will be clear that no consent is required. But,

sometimes, it will not be clear either way.

125 In these latter circumstances, the department must do the best it can with what information it has. The Palace do not like to be bothered unnecessarily and, if an approach is made too early, it increases the risk that other issues will arise on the draft bill that will require the department to go back to the Palace again. On the other hand, it is important to give the Palace as much early warning as possible and to meet the requirement that an approach is made giving at least the minimum 14 days notice required.<sup>65</sup>

#### *Informing the Whips*

126 The Whip's Office (ie Roy Stone) should be informed when Queen's or Prince's consent is being sought. It will normally be sufficient to send him a copy of any relevant letter to the department.

127 This is particularly important where consent on behalf of a Duchy is likely to be needed. Delays in obtaining such consent have been experienced in the past and sometimes it has been necessary for the Whip's Office to become involved to try to speed things up.<sup>66</sup>

#### *Writing to the House authorities*

128 We need to write to the Public Bill Office in the House in which the bill is to be introduced about Queen's and Prince's consent (as well as other matters). The letter should be copied to the Public Bill Office in the other House because the House authorities need to reach common agreement on Queen's or Prince's consent (as they do with all matters of common interest to both of them).

#### *Informing the Palace of further developments*

129 The Palace should be kept informed by the department of any developments subsequent to their original approach which fall outside the terms of the original consent. Thus, for example, new consent issues might arise after the Palace has given its original consent and before the bill is introduced and the Palace should be kept informed of these. Similarly, once the bill has been introduced, the Palace should be kept informed of any subsequent amendments that raise further issues of consent.

#### *Other*

130 Where consent is required, the department should be reminded that they are responsible for its signification in each House.

### **G: Miscellaneous**

#### *Draft bills*

131 Queen's or Prince's consent does not need to be obtained (and cannot be signified) in relation to a draft bill which is to be published for consultation. It is also unnecessary for the department to approach the Palace for an indication that the consent will be forthcoming in due course although, out of courtesy, the department might wish to alert the Palace to any

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<sup>65</sup>For some of the history to this rule, see A29.13.09.

<sup>66</sup>See the 1st PC circular of 12.07.93.

draft bill that significantly affects the Crown's interests.<sup>67</sup>

#### *Refusal of consent*

132 If Queen's or Prince's consent is not signified (whether because of a refusal to give it or a failure to obtain it), the question on the relevant stage of the bill cannot be proposed.

133 Thus, Queen's consent has, on occasion, been refused to block the progress of a private member's bill. See, for example, the proceedings on the Military Actions Against Iraq (Parliamentary Approval) Bill 1999 where Queen's consent was not signified on second reading of the bill and so the Speaker was unable to propose the question on the second reading.<sup>68</sup>

134 Advice to refuse consent in relation to other private members' bills has been given on the basis that there was no time available to debate the bills and there was no reasonable prospect of them making progress.<sup>69</sup>

135 However, usually, consent is not refused even for bills that the government opposes. In these cases, it is understood that the grant of consent does not imply approval by the Crown or its advisers but only that the Crown does not intend that, for lack of consent, Parliament should be debarred from debating such provisions.<sup>70</sup>

136 For further information on private members' bills, see paragraphs 166 to 171 and 260 to 262 of the pamphlet on that topic. See also the article by Rodney Brazier in the Cambridge Law Journal (March 2007) entitled "Legislating about the Monarchy" which discusses Queen's consent (at p95-7) and cites examples of private members' bills where consent has been withheld.

#### *Inadvertent failure to signify consent*

137 Proceedings on a bill have been declared void because of a failure, through inadvertence, to signify Queen's consent at the appropriate time.<sup>71</sup>

138 However, this did not happen on the Pollution Prevention and Control Bill 1999 when the Lords Public Bill Office forgot about the need for Queen's consent and, accordingly, it was not signified on third reading (20th May 1999). The bill went to the House of Commons where Queen's consent was signified on third reading (14th July 1999). The bill was amended in the House of Commons and, to make up for the earlier omission, the Lords Public Bill Office simply arranged for Queen's consent to be signified on Lords consideration of Commons amendments (which took place on 26th July 1999).<sup>72</sup>

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67. See Information Bulletin (23.06.04) and paragraph 18.3 and 22.14 (which are in identical terms) of the *Guide to Making Legislation* ([http://www.cabinetoffice.gov.uk/secretariats/economic\\_and\\_domestic/legislative\\_programme/guide\\_html/publication\\_in\\_draft.aspx](http://www.cabinetoffice.gov.uk/secretariats/economic_and_domestic/legislative_programme/guide_html/publication_in_draft.aspx))

68. See A29.13.15.

69. See A29.13.28.

70. HC Deb (1966-67) 743, c 891.

71. CJ (1852) 157; CJ (1911) 388; CJ (1948-49) 323.

72. See A29.13.30. A similar thing happened on the bill for the Pensions Act 2004 where the Commons forgot to signify Queen's consent on third reading but corrected this oversight on CCLA. Likewise in the case of the bill for the Health Act 2006, the need to signify Queen's consent on third reading in the Commons was overlooked but this was corrected on CCLA.

### *Consent in the absence of the Queen*

139 If the Queen is absent from the United Kingdom, the communication of the consent refers instead to Counsellors of State acting on Her Majesty's behalf.<sup>73</sup>

140 There may be awkward questions as to what to do if the Queen was present when the consent was communicated to the department but is absent when it is to be signified or vice versa. Or if a consent originally given by Her but not yet signified needs to be confirmed or expanded (because of later amendments to the bill) at a time when She is absent from the United Kingdom.

141 However, the Queen is only very rarely absent from the United Kingdom while Parliament is sitting and our role is, in any event, likely to be confined to warning the department and the Whips of the problem if we become aware that She is absent from the United Kingdom and that this is likely to pose a problem for the signification of the consent.

### *Consent before introduction of a bill*

142 It used to be the case that certain constitutional bills such as bills reforming the composition of the House of Lords required the monarch's consent before introduction.<sup>74</sup> Thus, Lord Simon needed an Address to the Crown and a message from Her Majesty on 4th December 1952 before he could introduce his Life Peers Bill.<sup>75</sup> However, this doctrine has fallen into disuse, at least so far as government bills are concerned (whether or not mentioned in the Queen's speech).<sup>76</sup> Thus, it was not adhered to in connection with the bills for the Life Peerages Act 1958, the Peerages Act 1963 and the House of Lords Act 1999. Nor was it adhered to in relation to the Parliament Bill of 1969.<sup>77</sup>

143 So far as private members' bills are concerned, see –

- paragraphs 166 to 171 and 260 to 262 of the Office Pamphlet on Private Members' Bills,
- Daniel Greenberg's note to Christopher Jenkins of 11.11.96,<sup>78</sup>
- the 1st PC circular of 13.10.86, and
- A29.13.27.

### *Queen's speech*

144 The fact that a bill affecting the Crown has been mentioned in the Queen's speech does not exempt it from the need for Queen's consent.<sup>79</sup>

### *Royal Assent*

145 Strictly speaking, the granting of Queen's or Prince's consent for a bill is merely a consent for Parliament to debate the bill and is without prejudice to the right of the monarch to withhold Royal Assent to the bill.<sup>80</sup> In practice, the distinction is an empty one because

73.CJ (1973-74) 146.

74.See Lord Lansdowne 1911 Parl. Deb. Lords 5th Series Vol VII c. 763.

75.See Parl. Deb. Lords 5th Series Vol 179 c.749.

76.See the 1st PC circular of 13.10.86.

77.See A29.13.13 (and. for an example of confusion caused by it, see A29.13.06).

78.See A29.13.22.

79.Erskine May at p.710.

Royal Assent is never refused for a bill that has successfully negotiated its way through Parliament.

146 The issue of consent is entirely a matter of House procedure and becomes redundant once a bill has received Royal Assent. An Act cannot generally be challenged on the grounds of an imperfection in its procedure and, in any event, Royal Assent is itself an indication of the Queen's consent to a bill.

*Office of the Parliamentary Counsel*

*10 November 2010*



## Appendix

### Examples of when consent has, or has not, been required

#### *Armed Forces*

1 The Commons Public Bill Office confirmed on the Armed Forces Bill 2005/06 that provisions affecting the armed forces do not need Queen's consent because the armed forces fall within the exception for Crown servants. This is despite some apparent departures from that line for some provisions of past bills about the armed forces.

2 The Commons Public Bill Office also considered whether Queen's consent was required for clauses substituting statutory provision for arrangements formerly made under the prerogative. For example, Boards of Inquiry, which for the Navy were formerly convened under the prerogative, were made statutory under the bill. However, they took the view that Queen's consent was not required for any of these encroachments on the prerogative. This conclusion seems to have been driven by a wider principle that Parliament can alter service law freely without the need for Queen's consent.

#### *Bona vacantia*

3 When a company is dissolved, its property becomes bona vacantia under section 654 of the Companies Act 1985<sup>81</sup> and vests in the Crown, the Duchy of Lancaster or the Duchy of Cornwall (depending upon the location of its registered office). Under section 651 of the Act, the court may declare a dissolution void. Under section 653 a company which has been struck off the register (and therefore dissolved) can be restored to the register. In both cases, the value of property which has vested under section 654 is returned to the company.

4 Section 51 of the Companies (Audit, Investigations and Community Enterprise) Act 2004 enables the Regulator of Community Interest Companies to apply to the court for orders under sections 651 and 653. Queen's and Prince's consent was required because this increased the possibility of an order being made under those sections and the Crown or Duchies having to return property to the resurrected company.

5 Bona vacantia issues also arise in other cases. Bona vacantia is the name for ownerless property that passes to the Crown<sup>82</sup> and this can also happen in relation to undistributed property on an intestacy and in relation to property disclaimed under a will where there is no residuary beneficiary. Certain trust property might also end up as bona vacantia.<sup>83</sup>

6 On the bill for the Civil Partnership Act 2004, the Lords Public Bill Office agreed that

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81. Note that sections 651 to 655 of the Companies Act 1985 were repealed by the Companies Act 2006. See now sections 1012 to 1014 and 1034 of that Act as regards *bona vacantia*. The change in section 1034 allowing the Crown to deduct reasonable expenses of sale was obviously to the benefit of the Crown and so no issue of consent arose in respect of that change. Nevertheless, the Bill for the 2006 Act (initially called the Company Law Reform Bill) did require Queen's and Prince's consent - Lords Journal 23rd May 2006, p.868.

82. For property in England and Wales "the Crown" will be the relevant division of the Treasury Solicitor's department or the Duchy of Cornwall or the Duchy of Lancaster. Separate administrative arrangements are in place for property in Scotland and Northern Ireland.

83. The right to bona vacantia for estates is now based on statute: the Administration of Estates Act 1925.

Queen's consent was not required on that occasion in connection with changes in the intestacy rules which could affect bona vacantia.

7 In the case of the bill for the Charities Act 2006, the House Authorities took the view that Queen's and Prince's Consent was required to be signified at Third Reading because it was possible that the changes made by the bill to the cy-pres jurisdiction would reduce the amount of bona vacantia to which the Crown (or the Duchy) might be entitled.<sup>84</sup>

*Child maintenance - deduction from earnings orders*

8 In the case of the Child Maintenance and Other Payments Bill (2006/07), it was decided that Queen's consent was required in respect of the provisions of the Bill concerning deduction from earnings orders. It appears that the interest of the Crown was affected because there was a risk that the provisions would increase the number of cases in which Her Majesty is required to make payments under such orders in respect of staff of the Royal Household.

9 An argument that the consent given for the Child Support Act 1991 (which covered the original application of deduction from earnings orders to the Royal Household) was sufficient to cover the minor extension of the application of such orders made by the Bill was rejected. Likewise an argument that the extension was so minor as to be de minimis was not accepted.<sup>85</sup>

*Civil partnerships and royal marriages*

10 Queen's consent was required for the bill for the Civil Partnership Act 2004 because a declaration under clause 60 of that bill about the validity of a civil partnership would bind Her Majesty.

11 Royal marriages is an area that can give rise to issues of Queen's consent depending upon the particular circumstances of the case.

*Clergy*

12 The bill for the House of Commons (Removal of Clergy Disqualification) Act 2001 removed any disqualification from membership of the House of Commons that arose by reason of a person having been ordained or being a Minister of a religious denomination but ensured that Lords Spiritual continued to be disqualified from membership.

13 Originally, the House authorities decided that Queen's consent was required on the basis that the Queen's interest as Supreme Governor touched on the position of Archbishops and Bishops in Parliament. But they changed their mind when they discovered that King's consent had not been required for the bill which became the House of Commons (Clergy Disqualification) Act 1801. That Act disqualified persons ordained to the office of priest or deacon and ministers of the Church of Scotland from the Commons.

14 Although the bill for the 2001 Act seemed to touch directly on matters concerning the Queen's role as Supreme Governor and the House authorities did not know why consent had not been required in 1801, the precedent was held to be decisive on this occasion and no

84. See the letter from Peter Knowles of 25.10.04 to Malcolm Jack, the letters from Peter Knowles to Tom Mohan of 01.12.04 & 13.12.04 and the letter from Peter Knowles to the Lords PBO of 17.05.05.

85. See the letter of 28 March 2007 from Douglas Hall to Tom Mohan, Tom's reply of 30 March, Edward Stell's letter to Robert Rogers of 22 May and Robert's reply of 24 May.

consent was required.

#### *Council tax and rates*

15 The Queen is liable to council tax on her private estates because of section 8 of the Crown Private Estates Act 1862. No other Crown property appears to be liable to council tax because the Local Government Finance Act 1992 does not apply to the Crown. The Queen is also liable for non-domestic rates on her private estates because of section 8 of the 1862 Act and section 65A of the Local Government Finance Act 1988 (as inserted by the Local Government and Rating Act 1997). Other Crown property is liable to non-domestic rates under section 65A of the 1988 Act. On this basis Queen's consent was required for the Rating (Empty Properties) Act 2007. Issues of Queen's consent can therefore arise in relation to bills dealing with council tax or non-domestic rates.

16 Prince's consent was not given to the bill that became the Local Government Finance Act 1992 (which created the council tax) nor for that which became the Rating (Empty Properties) Act 2007. The Duchy of Cornwall is liable for non-domestic rates as a result of section 65A of the Local Government Finance Act 1988.

#### *Courts*

17 No Queen's consent was needed for the following matters (which largely relate to appointments by Her Majesty) – <sup>86</sup>

- changing the "style" of female judges of the Court of Appeal (appointed by Her Majesty by Letters Patent);
- conferring the power to change the style of other judges;
- changing the commission of the peace so that there would be a single one for the whole of England and Wales;
- changing provisions about the appointment of justices of the peace in the Lancashire areas;
- making provision about the effect of the Act of Settlement on the appointment of justices of the peace; or
- replacing sheriffs in their role of enforcing writs of execution (sheriffs are appointed by Her Majesty "pricking" them) by enforcement officers.

18 Consent at third reading was required, however, in relation to provisions of the Courts, Tribunals and Enforcement Act 2007 which might have the effect changing the way in which jurisdiction over the Crown as a party to tribunal proceedings is to be exercised or the way it which it can recover a debt.

#### *Crown Estate Commissioners*

19 In the case of the bill for the Corporate Manslaughter and Corporate Homicide Act 2007 Queen's Consent was required because under the bill the Crown Estate Commissioners (who are a body corporate - see section 1 of the Crown Estates Act 1961) may be prosecuted for the offence of corporate manslaughter or corporate homicide. It was assumed that any resulting fine would be paid out of the revenues from the Crown Estate. The provisions of the bill were therefore capable of affecting the hereditary revenues of the Crown.<sup>87</sup>

<sup>86</sup>. See letter of Helen Caldwell to Paul Hayter of 15.11.02 on the bill for the Courts Act 2003. Paul Hayter agreed with the letter.

<sup>87</sup>. The relevant correspondence may be found in the Act archive under the keyword "Queen's/Prince's consent".

### *Education*

20 The bill for the Higher Education Act 2004 required Queen's consent on third reading in respect of the prerogative because it affected the jurisdiction of the Crown as a visitor of universities and Oxbridge colleges (see sections 20 and 46 of the Act).

### *Land*

21 Queen's consent was signified for the Agriculture (Miscellaneous Provisions) Bill 1962 because it amended the Agricultural Holdings Act 1948 which applied to land in the ownership of the Crown or the Duchies. No Prince's consent was signified because the Prince of Wales was not of age.

22 Questions have arisen about the need for consent in relation to animal health and welfare legislation. Queen's consent was given in relation the Bill for the Animal Welfare Act 2006 (largely on the basis of the powers of inspectors to enter onto land owned by the Crown Estate and the Duchies - there is an exemption for land forming part of the Queen's private estate)<sup>88</sup>

23 As regards issues concerning Queen's consent which have arisen in the context of hybrid bills containing powers to compulsorily acquire land, see paragraphs 156 to 159 of the Office Pamphlet on Hybrid Bill procedure.

### *National insurance contributions*

24 It appears that a consistent line has not always been taken in connection with legislation about national insurance contributions.<sup>90</sup>

25 Section 115 of the Social Security (Contributions and Benefits) Act 1992 provides that Parts 1 to 6 of that Act "apply to persons employed by or under the Crown in like manner as if they were employed by a private person".

Different interpretations of this provision in the past may have led to different decisions about Queen's consent in this area.

26 On the assumption that Her Majesty is indeed obliged, as an employer, to pay national insurance contributions, it is clear that issues of Queen's consent can arise in relation to bills dealing with such contributions.

27 In the case of the bill for the National Insurance Contributions and Statutory Payments Act 2004, a distinction was drawn by the House authorities for the purposes of Queen's consent between provisions making changes to the law of a general administrative nature and those making substantive changes to the national insurance contribution regime (for example, shifting liability between classes of national insurance contributions). Only the latter were said to give rise to a need for consent. And it appears that a similar distinction has been drawn in relation to some earlier bills in this field.

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<sup>88</sup> John Sellers to Malcolm Jack 06.10.05

<sup>90</sup> For more on this and the issue of Queen's consent for NICs, see the Information Bulletin of 02.11.04.

28 On the National Insurance Contributions Bill 2005, it was decided, on the basis of this type of reasoning, that Queen's consent (but not Prince's consent) was required because the bill made substantive changes to liability for national insurance contributions.<sup>91</sup>

29 In relation to the National Insurance Contributions Bill for the 2010-12 Session, Philip Davies suggested that increases in contributions do not require Queen's consent (citing as precedents the National Insurance Contributions Act 1992 and the National Insurance Contributions Act 2002). He also suggested that the NI "holiday" provisions for new businesses did not require Queen's consent on the basis that they were unlikely to affect anything Her Majesty might do and, if they did, they would affect Her positively rather than adversely. The PBO agreed with his position.<sup>92</sup>

#### *Passports*

30 Queen's consent was needed in relation to the Identity Cards Bills 2004-06. The bills potentially affected the issue of passports and passports are issued under the Royal prerogative.<sup>93</sup>

31 In the case of the Child Maintenance and Other Payments Bill (2006/07), it was decided that Queen's consent was required in respect of the provisions of the Bill which confer power on the new Child Maintenance and Enforcement Commission to make an order which will disqualify a person (who has failed to pay child support maintenance) from holding a UK passport. They are regarded as affecting the issuing of passports under the prerogative.<sup>94</sup>

32 It was noted that merely requiring the surrender of a passport does not engage the prerogative - see, for example, the travel restriction order provisions in the Criminal Justice and Public Order Act 2001 in relation to which Queen's consent was not required. (But query whether provisions requiring the surrender of a passport could in practice interfere with the prerogative as regards the issuing of passports.)

#### *Ports*

33 Queen's or Prince's consent needs to be considered very carefully in the context of ports, not least because the Duchy of Cornwall is the harbour authority for the Isles of Scilly.<sup>95</sup>

34 Thus, for example, Prince's consent was required on third reading in both Houses of Parliament for the bill for the Merchant Shipping and Maritime Security Act 1997 because the bill included a provision imposing new duties on harbour authorities (including the harbour authority for the Isles of Scilly). It is worth noting that, in this case, there was nothing in the text of the bill that dealt expressly with the Duchy of Cornwall and so it was not immediately obvious that Prince's consent needed to be considered.

35 It was similarly required for the Marine Navigation Aids Bill of 2009-2010, where the Prince as the statutory harbour authority was also the local lighthouse authority. As the Bill made provision about lighthouse authorities it affected the Duchy. In this case, the House

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91. See letters of Elizabeth Gardiner to Malcolm Jack of 20.09.05 and 4.10.05 in connection with that bill.

92. See letters from Philip Davies to David Natzler of 07.10.10 and confirmation of the PBO's agreement in Jonathan Carter's email to Scott Trueman of 11.10.10.

93. See letter of Stephen Laws to Malcolm Jack of 10.11.04 (paras 8 to 10) and his email to Robin Woodland of earlier the same day.

94. See the letter of 16 May 2007 from Douglas Hall to Robert Rogers and Robert's reply of 17 May.

95. Also see A29.13.16.

authorities required signification at second reading.

*Restricting or ousting the courts' jurisdiction*

36 No consent was required for the Consular Relations Bill 1967 in relation to a provision which sought to restrict the jurisdiction of the courts where the jurisdiction was exercised by the courts under statute rather than the prerogative (the Queen as the fount of all justice). This example was relied upon by Daniel Greenberg in 2003.<sup>96</sup>

*Statutory maternity pay, adoption pay, paternity pay and sick pay*

37 Section 169 of the Social Security (Contributions and Benefits) Act 1992 provides that the provisions of Part 12 of that Act (which relate to statutory maternity pay) "apply in relation to women employed by or under the Crown as they apply in relation to women employed otherwise than by or under the Crown". Section 171ZQ makes corresponding provision in relation to Part 12ZB (statutory adoption pay).

38 The wording used in sections 169 and 171ZQ is similar to the wording used in section 115(1) of the Act in relation to Parts 1 to 6 of the Act.

39 Issues of Queen's consent may also arise in relation to statutory paternity pay and sick pay.

40 For example, by virtue of the definition of "employer" in section 171ZJ(1) of the 1992 Act, the effect of the provisions in the Work and Families Bill 2005/6 was that the Queen was liable to pay additional statutory paternity pay in respect of members of the Royal Household who took advantage of the new rights following the birth or adoption of a child. This was considered to be a substantial restructuring of the existing arrangements for which Queen's consent was needed.<sup>97</sup>

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<sup>96</sup>See A29.13.11.

<sup>97</sup>See Catherine Johnston's letters to Malcolm Jack of 16.09.05 and 03.10.05 in connection with that bill.



## **CROWN APPLICATION**

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These notes are intended for members of the Office of the Parliamentary Counsel.

The Pamphlet takes account of practice as at 1 August 2008. Please let the Know-How Counsel know of any later developments and they will be published in the next Information Bulletin and then included in the next revision of the Pamphlet.

The Office Pamphlets and 1st PC circulars referred to can be found on the OPC intranet.

*Office of the Parliamentary Counsel*

*1 August 2008*



## CROWN APPLICATION

### CONTENTS

A: INTRODUCTION .....	1
B: THE BASIC PROPOSITIONS .....	2
The presumption that an Act does not bind the Crown .....	2
Binding the Crown by express words .....	3
Binding the Crown by necessary implication .....	4
Other exceptions to the presumption .....	6
Presumption irrelevant where no obligations or restraints imposed .....	7
Presumption irrelevant where persons or property fall outside the Crown .....	8
Waiver of Crown immunity .....	13
C: PRACTICAL MATTERS .....	13
Instructions .....	13
Informing the Treasury Solicitor and the Attorney General .....	14
Queen's or Prince's consent .....	14
D: OTHER ISSUES .....	14
Partial application clauses .....	14
Amendments of Acts .....	15
Other members of the Royal Family .....	15
Other basic privileges and immunities of the Crown .....	16
Non-Crown bodies and Crown employment .....	16
Other relevant case-law .....	17
Other Office learning .....	17
APPENDIX - EXAMPLES OF CROWN APPLICATION CLAUSES .....	19
"This Act binds the Crown" .....	19
Application of Acts to different types of land .....	24
Section 22 of the Agriculture (Safety, Health and Welfare Provisions) Act 1956 .....	27
Section 1(2)(b) of the Corporate Manslaughter and Corporate Homicide Act 2007 .....	27
Further examples .....	28

## CROWN APPLICATION

### A: INTRODUCTION

- 1 The purpose of this Pamphlet is to provide some background information about Crown application.
- 2 The basic propositions were set out in correspondence between the First Parliamentary Counsel and the Treasury Solicitor in 1982.<sup>1</sup>
- 3 They are—
  - An Act does not bind the Crown unless it does so expressly or by necessary implication;
  - The courts have not been astute to find any such necessary implication or to support any other general exceptions to this doctrine;
  - The Crown can take advantage of an Act without prejudicing the doctrine (see section 31(1) of the Crown Proceedings Act 1947);
  - The Crown can waive its immunity.
- 4 This Pamphlet considers the basic propositions under the following headings—
  - the presumption that an Act does not bind the Crown;
  - binding the Crown by express words;
  - binding the Crown by necessary implication;
  - other exceptions to the presumption;
  - presumption irrelevant where no obligations or restraints imposed;
  - presumption irrelevant where persons or property fall outside the Crown;
  - waiver of Crown immunity.
- 5 It also—
  - considers various practical matters (instructions on Crown application, the need to inform the Treasury Solicitor and the Attorney General about matters of Crown application and the relationship between Crown application and Queen's or Prince's consent); and
  - discusses certain other issues involving Crown application (partial application clauses, amendments of Acts, other members of the Royal Family, other basic privileges and immunities of the Crown, other relevant case-law and other Office learning).

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<sup>1</sup> See M 332 (Part 2).

## B: THE BASIC PROPOSITIONS

### The presumption that an Act does not bind the Crown

6 It was settled in England as early as 1561 that the Crown was bound by any statute that applied to it.<sup>2</sup> It is also clear that the Crown has no power (except as part of the legislature) to suspend the operation of a statute for a time, or to dispense with a statute in favour of a particular person or group. These “suspending” and “dispensing” powers were abolished by the Bill of Rights in 1688.

7 The Crown is not therefore immune from statutes by virtue of any rule of the constitution. However, it does enjoy a measure of immunity by virtue of a common law rule of statutory construction. This rule is the presumption that an Act does not bind the Crown. It was reaffirmed by the House of Lords in *Lord Advocate v Dumbarton District Council*.<sup>3</sup>

8 Some have argued that the presumption is an expression of a prerogative immunity subject to the possibility of disapplication by Parliament but the better view seems to be that it is merely a principle of statutory construction.<sup>4</sup>

9 The presumption applies to all statutes, whether of general application or merely applying to rights, powers, privileges or immunities that are peculiar to the Crown.<sup>5</sup> It applies to statutes whether or not penal or taxing. It applies equally whether an Act affects persons or things. And it is expressly saved by section 40(2)(f) of the Crown Proceedings Act 1947.

10 The presumption was originally a rule of the law of England and was not recognised by Scots law before the parliamentary union of England and Scotland in 1707. However, the House of Lords made it clear in *Lord Advocate v Dumbarton District Council* that the presumption is now one that applies to all parts of the United Kingdom.

11 Thus, Lord Keith of Kinkel said –

“An Act of the United Kingdom Parliament may apply to the whole of the Kingdom or only to particular parts of it. There would appear to be no rational grounds upon which a different approach to the construction of a statute might be adopted for the purpose of ascertaining whether or not the Crown is bound by it according to the jurisdiction where the matter is being considered. In the case of an Act in force over the whole of the United Kingdom the answer must be the same whether its application to the Crown in Scotland or in England or in Northern Ireland is in issue. It is not conceivable that Parliament could have a different intention as regards the application of the Act to the Crown in the various parts of the Kingdom. Likewise, where Parliament is legislating for

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2. *Willion v Berkley* (1561) 1 Plowden 223; 75 E.R. 339 (KB).

3. [1990] 2 AC 580; [1989] 3 WLR 1346.

4. See Sunkin and Payne, “The Nature of the Crown”, p.173 and Craies on Legislation (8th edition: 2004) p. 431.

5. See, for example, *Province of Bombay v Municipal Corporation of Bombay* [1947] AC 58 (PC). In this case, the Privy Council held that it made no difference that the land in question had been acquired from private owners rather than being held by any right peculiar to the Crown. It was enough that it was owned by the Crown.

Scotland only it cannot, for that reason alone, be held to have a different intention from what it would have had if legislating for England only.”

12 Some older statutes applying only to Scotland have Crown application clauses which make it clear that the statute does not apply to the Crown although Scottish drafters were asked to try to avoid such provisions wherever possible. An example is section 14 of the Flood Prevention (Scotland) Act 1961. Provisions of this kind reflected the previous uncertainty as to the precise position in Scotland<sup>6</sup> but there is no need for them today.

13 The presumption extends to the Crown in right of the Duchy of Lancaster.<sup>7</sup>

14 The presumption can have an indirect as well as a direct application. For example, the Restrictive Trade Practices Act 1956 (repealed) was held not to apply to an agreement to which the Crown was not a party but which was supplemental to an agreement to which the Crown was a party.<sup>8</sup>

15 There are various circumstances in which the presumption that an Act does not bind the Crown is overturned or is not relevant.

16 The presumption is overturned if—

- an Act binds the Crown by express words;
- an Act binds the Crown by necessary implication; or
- other exceptions apply.

17 The presumption is not relevant if—

- an Act does not impose any obligations or restraints; or
- the persons or property affected do not fall within the Crown.

18 These cases are discussed in more detail below.

19 In addition, it is worth noting that it is stated government policy that the government should comply with all legislation on a voluntary basis whether expressly bound or not. Government policy is that departments and other Crown bodies “are not shielded from obligations placed upon others”<sup>9</sup> and “Crown immunity is being progressively reduced, as legislative opportunities arise. In the meantime, Crown bodies are expected to behave as if they were bound by regulations”.<sup>10</sup>

### **Binding the Crown by express words**

20 There are different ways in which an Act may bind the Crown expressly.

21 It may contain a Crown application clause which will usually be located towards the

6. See M332/103.

7. *A.G. of Duchy of Lancaster v Moresby* [1919] W.N. 69.

8. *Re Telephone Apparatus Manufacturer's Application* [1963] 1 WLR 463.

9. HC Deb, vol 223, col 490, 21.04.93.

10. *The Citizen's Charter, Second Report* 1994, Cm 2540, p 119. It is also worth noting in this context that the Queen has agreed to pay income tax although she is not bound to do so.

end of the Act (or the end of a Part). The Appendix contains a number of examples of these clauses and discusses particular aspects of them.

22 Alternatively, an Act may bind the Crown expressly by naming the Crown in particular provisions.

23 However, there are surprisingly few Acts that do bind the Crown expressly.<sup>11</sup> There are a variety of reasons for this. In some cases, the Crown will be bound by necessary implication. In other cases, the Crown will not be relevant to the bill and so no issue of Crown application will arise. And, in other cases, the policy will be that the Crown is not to be bound and so silence will achieve the right result.

### **Binding the Crown by necessary implication**

#### *Scope of necessary implication*

24 Lord Keith of Kinkel touched on the question of what amounted to necessary implication in *Lord Advocate v Dumbarton District Council*—

“As to the considerations which may be applicable for the purpose of finding a necessary implication that the Crown is bound, it is clear that the mere fact that the statute in question has been passed for the public benefit is not in itself sufficient for that purpose<sup>12</sup>.... Similarly, the possibility of a distinction in the position of the Crown as regards lands held *jure coronae* and as regards lands held otherwise must be rejected.

Accordingly it is preferable, in my view, to stick to the simple rule that the Crown is not bound by any statutory provision unless there can somehow be gathered from the terms of the relevant Act an intention to that effect. The Crown can be bound only by express words or necessary implication. The modern authorities do not, in my opinion, require that any gloss should be placed upon the formulation of the principle.”

25 This is all very well but, in order to understand what is meant by “necessary implication”, it is necessary to place a gloss on it or, at least, look more closely at what it might mean. It is not self-explanatory.

26 For example, in *Gorton Local Board v Prison Commissioners*<sup>13</sup> Day J said—

“In the absence of express words the Crown is not to be bound, nor is the Crown to be affected except by necessary implication. There are many cases in which such implication does necessarily arise, because otherwise the legislation would be unmeaning. That is what I understand by “necessary implication”. Here the Crown is not mentioned and no necessary implication of any sort or kind arises ...”

27 A slightly looser meaning than that the legislation would otherwise be unmeaning was suggested by Lord Du Parcq on behalf of the Privy Council in *Province of Bombay v Municipal*

11. An indication of this is the fact that a search of Legislation Direct reveals only a handful of Acts each year that have Crown application clauses.

12. See *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58, 62-65.

13. [1904] 2 KB 165, 167.

*Corporation of the City of Bombay*<sup>14</sup> –

“The Crown may be bound, as has often been said, “by necessary implication”. If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named.”

28 However, he did go on to say, in rejecting an argument that, wherever an Act is for the public good, it must be taken to bind the Crown<sup>15</sup> –

“Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficial purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound. Their Lordships will add that when the court is asked to draw this inference, it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words.”

29 In *Department of Transport v Egoroff*<sup>16</sup> the court approved the *Province of Bombay* case and stated that the test must be either an examination of the wording of the Act or in certain specific cases a demonstration that the purpose of the sections would be wholly frustrated unless the Crown were bound. This might raise a necessary implication outside the wording of the Act.

30 All these examples show that the scope of the necessary implication test is not wholly certain. The trend in the existing case-law is towards a very narrow test such as whether the purpose of a statute is wholly frustrated if the Crown is not bound but dicta in the *Province of Bombay* case suggest that a slightly looser test is possible.

31 If the courts were willing to develop this approach further in the future, a looser test might be whether the context of the statute makes it clear beyond doubt that the Crown must be bound.<sup>17</sup> Alternatively, it has been argued that “insistence on necessary implication is typical of the unrealistic attitude displayed by some judges in resisting implied meaning in statutes. The question is always what did Parliament intend? It is answered by drawing any proper inference.”<sup>18</sup>

*Reliance on necessary implication: Community obligations*

32 An example of where we tend to rely upon necessary implication for provisions to bind the Crown is in the case of instruments made under section 2(2) of the European Communities Act 1972. As a matter of Community law, Community obligations are binding on a member State and emanations of the State and, as a result, instruments made under section 2(2) are generally taken to bind the Crown regardless of whether they say so expressly.<sup>19</sup>

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14.[1947] AC 58, 61.

15.[1947] AC 58, 62-63.

16.(1986) 1 EGLR 89, 18 HLR 326 (CA).

17.Peter Hogg, “Liability of the Crown”, p.201.

18.Bennion “Statutory Interpretation” (5th edition, 2008), p.210.

33 The same logic could be applied to a bill whose sole purpose is to implement a Community obligation although this is likely to be a rare case because of the existence of section 2(2) of the 1972 Act.

34 In both cases, one needs to overcome the argument that the provisions do not bind the Crown because, even though the Community obligation binds the Crown, the intention is for it to be implemented by administrative action rather than by statutory obligation.<sup>20</sup> The context will determine how plausible such an argument is in a particular case.

#### *Exclusion of implication*

35 Section 30 of the Cardiff Bay Barrage Act 1993 is an example of a provision which has been drafted because of a concern over necessary implication. Somewhat unusually, this section expressly provides that the Act does not bind the Crown and it was drafted in this way because of a concern that the compulsory purchase provisions in the Act would otherwise be construed as applying to the Crown by necessary implication.

36 The 1993 Act contained power for the Cardiff Bay Development Corporation to acquire compulsorily land "shown on the deposited plans and described in the book of reference" (section 3). The book of reference contained a list of all the "land to be acquired" for the purposes of the Act and Crown land was included in the book in order to give a complete picture of what was envisaged although it was not intended that the compulsory acquisition powers should be exercisable in relation to Crown land (which would, instead, be transferred by agreement).

37 The concern was that the express mention of Crown land (and an express mention of its ownership by the Crown) in the book of reference amounted to a necessary implication that the compulsory acquisition powers should be available in relation to that land. Hence the provision in section 30 of the Act that the Crown should not be bound.<sup>21</sup>

#### **Other exceptions to the presumption**

38 There are a number of other exceptions to the presumption that a statute does not bind the Crown.

39 For example, a statute might bind the Crown if it is incorporated by reference into an Act that does bind the Crown.

40 Or, where the Crown is a litigant in civil proceedings, it follows from the Crown Proceedings Act 1947 that it will be bound by all relevant statutes relating to civil proceedings.

41 Or a statute might bind the Crown because it is incorporated by reference into a Crown contract although, clearly, it would only be enforceable at the suit of the other party to the contract and so the Crown would not, in this way, be exposed to any criminal liability or any

19. See Section 5.2 (Crown and Parliament) of the COLA Guidance on *Implementing European Union Law* (July 2008) - available on the OPC intranet under Know-how>Interdepartmental Guidance. See also A28.02.02.

20. See, for example, A28.02.02.

21. See A22.02.06.

form of public enforcement.

### **Presumption irrelevant where no obligations or restraints imposed**

42 The House of Lords in *Lord Advocate v Dumbarton District Council* seems to have accepted that the presumption of Crown immunity can only be relevant if there is something to be immune from. In other words, a statute has to be "imposing obligations or restraints on persons or in respect of property" for the rule to be triggered. It recognised that the very notion of a statutory provision being binding on a person connotes that the person's freedom of action is in some measure thereby constrained.

43 In the absence of any such obligation or restraint, the presumption cannot apply.

44 There may be no obligation or restraint either where an Act has no effect on the Crown or where it has a beneficial effect on the Crown.

45 A provision that had no effect on the Crown was considered in *Madras Electric Supply Corporation v Boarland*.<sup>22</sup> In this case, the computation of a corporation's income tax depended upon whether the corporation had sold its undertaking to a "person". The corporation had actually sold its undertaking to the Crown and so the question in issue was whether the word "person" included the Crown. The House of Lords said yes. Their Lordships reasoned that in this context the "ordinary meaning" of the word "person" included the Crown. If the word were given its ordinary meaning, the computation of the corporation's tax would be affected, but this would make no difference to the Crown. Since the statutory provision could not operate to the prejudice of the Crown, there was no reason to give the word "person" other than its ordinary meaning.

46 If a provision has only a beneficial effect on the Crown, the presumption of Crown immunity will also not apply. In such a case, the Crown may be able to take the benefit of a statute which does not name it or apply to it by necessary implication<sup>23</sup> although the question whether it is entitled to do so is answered by the application of ordinary principles of interpretation.

47 This ability to take the benefit of a statute in the right context is recognised by section 31(1) of the Crown Proceedings Act 1947 –

"This Act shall not prejudice the right of the Crown to take advantage of the provisions of an Act of Parliament although not named therein; and it is hereby declared that in any civil proceedings against the Crown the provisions of any Act of Parliament which could, if the proceedings were between subjects, be relied upon by the defendant as a defence.... may, subject to any express provision to the contrary, be so relied on by the Crown."

48 Of course, a statutory provision may be both beneficial and burdensome to the Crown.

49 The likelihood is that, if the Crown seeks to take the benefit of an Act by which it is not bound, it must also take the burden so far as it exists. This follows from the fact that the

22.[1955] AC 667 (HL).

23.*Willion v Berkley* [1961] 1 Plowd 223, 243; *Town Investments Ltd v Department of the Environment* [1976] 3 All ER 479 (CA), reversed on other grounds [1977] 1 All ER 813 (HL).



Crown is expected to behave fairly and to serve the public interest.

50 Thus, for example, Lord Moulton said in *A-G v De Keyser's Royal Hotel Ltd*<sup>24</sup> —  
“When the Crown elects to act under the authority of a statute, it, like any other person, must take the powers it thus uses cum onere”.

51 To the extent that the Crown takes the burden of an Act in these circumstances, it waives its immunity.

### **Presumption irrelevant where persons or property fall outside the Crown**

#### *Scope of “the Crown” for the purposes of the presumption*

52 The full scope of the Crown for the purposes of the presumption of non-application to the Crown is uncertain.

53 The Crown is an inherently ambiguous concept and a distinction is traditionally made between the monarch in her personal capacity and the monarch or the Crown as the political entity which exercises governmental powers (ie, the executive government<sup>25</sup> including government Ministers, government departments, members of the armed forces etc.). The concept of the Crown embraces both elements.

54 But difficult questions can arise when one has to look more closely at what falls within the Crown for the purposes of the presumption.

55 As mentioned above, the presumption applies equally whether an Act affects persons or things although, often, the issues overlap because both persons and things are involved.

56 So far as the presumption affects things, it might, for example, affect Crown property such as Crown land,<sup>26</sup> Crown vehicles,<sup>27</sup> Crown ships or Crown aircraft.<sup>28</sup>

57 So far as the presumption affects people, there are different ways of looking at the questions that can arise.

#### *Classification in Bank voor Handel and classification by Sandra Burns*

58 In *Bank voor Handel en Scheepvaart, NV v Administrator of Hungarian Property*,<sup>29</sup> Lord Tucker identified three classes of persons who benefit from the presumption of Crown immunity.

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24.[1920] AC 508, 549-550.

25.*Town Investments Ltd v Department of the Environment* [1978] AC 359.

26.See Office Pamphlet *Queen's or Prince's consent* for a detailed explanation of the Crown Estate, the Duchy of Lancaster, the Duchy of Cornwall and the private estates of the Crown.

27.See, for example, section 167(2) and (3) of the New Roads and Street Works Act 1991.

28.See, for example, section 105(3) of the Transport Act 2000 or section 100(1) of the Railways and Transport Safety Act 2003.

29.All ER 1954 Vol 1 p. 969.

59 The three classes were—

- the Sovereign personally;
- her servants or agents; and
- persons who are not Crown servants or agents but who, for certain limited purposes, are considered to be “in consimili casu”.

60 An example of persons falling within the third class was owners or occupiers of property exclusively used for the purposes of government although the presumption of Crown immunity only protected them in respect of liability or disability arising in respect of the ownership or occupation of such property.

61 Sandra Burns<sup>30</sup> found it helpful to look at matters in a slightly different way and identified at least three different classes of case that can be distinguished (in addition to the case of the Sovereign acting in person)—<sup>31</sup>

- cases where the question is one of the status of the body or person claiming exemption;
- cases where the question is whether the body or person concerned, though admittedly not having general Crown status, should nevertheless fall within the Crown presumption for the purpose of taking or carrying out any particular action or activity (when he will be acting as agent of the Crown);
- cases where the question is whether some transaction between, or operation involving, persons who admittedly do not enjoy either general Crown status or the benefit of the presumption as a result of the particular action or activity that they are engaged upon, should benefit from the Crown presumption because of the possible effect on Crown interests of applying the relevant statute to the transaction.

*(1) Status of body or person*

62 The first class is about whether there is a continuing relationship between the body or person and the Crown from which it may be deduced that it or he acts on behalf of the Crown, either generally or, at least, in respect of his official duties or when acting in the course of his employment. A typical example is a Minister of the Crown or another person employed in the public service of the Crown.

63 Another example is public bodies whose general status as Crown or non-Crown bodies is determined by statute or needs to be determined by the courts for the purpose of knowing whether they would benefit from the presumption.

64 Modern statutes will generally make it clear whether a new body is or is not a Crown body. Examples of provision for a Crown body are:

- section 1(3) of the Food Standards Act 1999 which provides that the Food Standards Agency performs its functions “on behalf of the Crown”;
- paragraph 22 of Schedule 1 to the Child Maintenance and Other Payments Act 2008 which provides that the functions of the Child Maintenance and Enforcement Commission, and of its members, are to be exercised on behalf of the

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30. A former member of this Office.

31. See A22.02.01

Crown, and also provides for civil proceedings in England and Wales and Scotland.

Examples of provision for a non-Crown body are:

- paragraph 1 of Schedule 2 to the Health Act 1999 which provides that the Commission for Health Improvement “is not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown; and the Commission’s property is not to be regarded as property of, or property held on behalf of, the Crown”;
- section 81 of the Housing and Regeneration Act 2008 which provides that “[t]he Office (and any member of the Office) (a) is not the servant or agent of the Crown, and (b) does not share any immunity or privilege of the Crown”.

(For a case in which a statement of non-Crown status did not lead to the expected result, see paragraph 106.)

65 Where it is unclear from the relevant legislation whether a body enjoys Crown status, the matter falls to be resolved by the courts. Denning LJ stated the test as whether the body or person “is properly to be regarded as the servant or agent of the Crown”.<sup>32</sup> In practice, it is often necessary to assess the degree of control exercisable over the body or person by Ministers. What seems to be required is not simply scope for ministerial direction or intervention but that the body is answerable to the government.<sup>33</sup>

66 In *Bank voor Handel en Scheepvaart, NV v Administrator of Hungarian Property*,<sup>34</sup> Lord Reid said –

“In my judgement the question whether the custodian is a servant of the Crown depends on the degree of control which the Crown through its Ministers can exercise over him in the performance of his duties. The fact that a statute has authorised his appointment is, I think, immaterial, but the definition in the statute of his rights, duties and obligations is highly important. .... when a statute creates an office it may give to the holder more or less independence from Ministerial control so that the officer has, to a greater or less extent, a discretion which he alone can exercise, and it may be that the grant of any substantial independent discretion takes the officer out of the category of servants of the Crown for the present purpose.”

67 The following are not, or have ceased to be, Crown bodies –

- the British Broadcasting Corporation (see *BBC v Johns (Inspector of Taxes)* [1965] Ch 32 (CA));
- health service bodies (which lost Crown status on the enactment of section 60 of the National Health Service and Community Care Act 1990); and
- official receivers (see *In Re Minotaur Data Systems Ltd* [1999] 1 WLR 1129 (CA) and *Mond v Hyde & Department of Trade and Industry* [1998] 3 All ER 832 (CA)).

32. *Tamlin v Hannaford* [1950] 1 KB 18, 22.

33. See, for example, *Gilbert v Trinity House Corporation* [1886] 17 QBD 795, *Commissioners of Works and Public Buildings v Pontypridd Masonic Hall Co Ltd* [1920] 2 KB 233 and *Tamlin v Hannaford* [1950] 1 KB 18 (PC).

34. In this case, the House of Lords made it clear that Ministers of the Crown were servants of the Crown (see, for example, (1954) All ER, Vol 1, 969 at 981-2).

68 Provision may be made for a body to lose the status of a Crown body. See section 11 of the Child Maintenance and Other Payments Act 2008 (review of status of Child Maintenance and Enforcement Commission; power to alter by order).

69 One result of the status exemption is that a person employed in the public service of the Crown acting in the course of his duties is not bound by, and therefore cannot be convicted of an offence under, a statute which does not bind the Crown.<sup>35</sup> But difficult issues can arise as to whether a person is indeed acting in the course of his duties and the scope of this rule is therefore not as wide as may at first appear. Generally, a person will not be acting in the course of his official duties as a servant of the Crown when doing something that is prohibited by the general law.<sup>36</sup>

*(2) Action or activity attracts Crown presumption*

70 The second class identified by Sandra Burns is where the question is whether the body or person concerned, though admittedly not having general Crown status, should nevertheless fall within the Crown presumption for the purpose of taking or carrying out any particular action or activity. This is the case where one looks at the particular action or activity and asks whether the body or person, in carrying out that action or activity, was acting on behalf of the Crown (so that his act is that of the Crown) in the particular matter in question.

71 Thus, for example, in some circumstances a contractor who is carrying out a task on behalf of the Crown might be held to benefit from the presumption in respect of that task.

72 Certain basic propositions about the applicability of Acts which do not bind the Crown to independent contractors who are doing things for the Crown which the Crown is authorised to do by or under statute were agreed by the First Parliamentary Counsel and the Treasury Solicitor in 1983.<sup>37</sup>

73 These were –

- a contractor doing work for the Crown does not prima facie obtain Crown exemption by virtue solely of the fact that he is carrying out a contract made with the Crown (ie he does not thereby obtain Crown status or any exemption in his own right);
- where a statutory authority to execute works is conferred on a Minister, that authority will also protect the contractors through whom the works are executed (as the instrument or agent of the Crown), to the same extent as it protects the Minister himself and such authority may in general be taken to extend to performing activities authorised by the statute in any manner in which it is lawful for the Minister to perform them, including any manner in which it is lawful for

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35. *Cooper v Hawkins* [1904] 2 KB 164 (DC). But there is doubt about how far this judgment goes: see *Wilkinson on Road Traffic Offences* and *Williams on the Criminal Law and Crown Proceedings Act 1947*.

36. For a discussion of this, see Craies, pages 440-443. See also M332/06. See also section 78(3) of the Equality Act 2006 which defines when an act is done on behalf of the Crown for the purposes of section 78(2) ("The remainder of this Part applies to an act done on behalf of the Crown as it applies to an act done by a private person").

37. See A22.02.01.

the Minister to perform them by reason of his being exempt from statutory provisions which do not bind the Crown;

- contractors could not claim exemption from statutes where they are acting outside the scope of the Crown's statutory authority or they are acting outside their contractual authority.

74 The result of these principles is that it will generally be unnecessary to include, in a bill conferring on a Minister authority to execute works, provisions exempting contractors engaged by the Minister for the purpose from the provisions of the bill that do not bind the Crown.

(3) *Effect on Crown interests attracts Crown presumption*

75 The third class identified by Sandra Burns is where the question is whether some transaction between, or operation involving, persons who admittedly do not enjoy either general Crown status or the benefit of the presumption as a result of the particular action or activity that they are engaged upon, should benefit from the Crown presumption because of the possible effect on Crown interests of applying the relevant statute to the transaction.

76 One example of this is where a bill affecting land does not bind the Crown and the question arises whether, in the absence of provision to the contrary,<sup>38</sup> a tenant or other person having an interest in Crown land will be immune by virtue of the Crown's interest in the land.

77 This was held to be so in the case of the Rent Acts in *Rudler v Franks*<sup>39</sup> where, following an earlier decision in *Clark v Downes*,<sup>40</sup> it was held that a sub-tenancy created by a tenant of the Crown was outside the Acts. These decisions were based on the rather mysterious proposition that the Rent Acts "operate in rem" but the true reason for them, as explained by Romer LJ in *Wirral Estates Ltd. v Shaw*<sup>41</sup> is that—

"the Acts not binding the Crown, it is the duty of the courts so to construe the Acts that the Crown and its property are in no way prejudicially affected by them."

78 As a result, in *Wirral Estates Ltd v Shaw*,<sup>42</sup> it was held that, if the Crown sold the reversion, the Crown's tenant did not thereby get the protection of the Rent Acts because to hold otherwise would be to deprive the Crown of part of the value of the reversion. The position under the Rent Acts was reversed by the Crown Lessees (Protection of Sub-Tenants) Act 1952.

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38. See, for example, section 22(2) of the Clean Air Act 1956 and section 10 of the Dumping at Sea Act 1974.

39. [1947] KB 530.

40. [1931] 145 LT 20.

41. [1932] 2 KB 247, 263.

42. [1932] 2 KB 247.

### Waiver of Crown immunity

82 It is open to the Crown to waive immunity from statute in particular cases although difficult questions can sometimes arise as to the extent of the waiver.

83 Waiver might, for example, happen where the Crown accepts the burden of a statute in order to take its benefit (see above).

### C: PRACTICAL MATTERS

#### Instructions

84 The question whether, and to what extent, a bill is to bind the Crown is a matter of policy which is to be decided on the merits and facts of a particular bill.<sup>44</sup> Precedents in the same area will clearly be important but should not be followed automatically.

85 There appears to be an increasing tendency to decide, on policy grounds, to bind the Crown unless there is good reason not to do so. This is a reflection of the stated government policy on the subject (see above) and was also the consensus emerging from an Inter-Departmental Working Group on Crown Immunity from Criminal Prosecution 2001-02.

86 The Office note on *Instructing Parliamentary Counsel*<sup>45</sup> reminds departments that instructions should deal with Crown application and warns that an express provision is usually wanted if an Act is to apply to the Crown.

87 However, it is still sometimes difficult to get full and timely instructions on the subject.

88 To quote from the First Parliamentary Counsel in 1984<sup>46</sup> –

“The application of Acts to the Crown is a troublesome corner of our work. The question of application to the Crown is often not faced until shortly before the Bill in question is nearly ready for introduction - partly, no doubt, because it is usually difficult to see what, if anything, needs to be said until the Bill is nearing its final shape, but also because in the end only a small proportion of Bills need to say

44.M332/02.

45.Dated 01.06.00 and available on the OPC intranet under Know-how>Interdepartmental Guidance.

46.Letter of Sir George Engle of 21.09.84 on A22.02.03.

anything about application to the Crown ..... In practice, it is rare for the draftsman to get much in the way of instructions on this aspect of a Bill, at least until he raises the point (perhaps by means of a cockshy draft) himself.”

### **Informing the Treasury Solicitor and the Attorney General**

89 The department are responsible for getting policy approval within Whitehall for any provisions of their bill which affect the Crown.

90 As a fall-back, we have also undertaken to send a copy of a bill at an early stage to the Treasury Solicitor if the bill applies to the Crown. See paragraph 11 of Chapter 1 of *Handling a Bill* for the name of the relevant official in the Treasury Solicitor's Department to whom the draft should be sent. We have also undertaken to keep the Treasury Solicitor informed on this aspect of the bill as the drafting progresses.<sup>47</sup>

91 Crown application is also one of the matters that needs to be mentioned in the letter to the Attorney General before L Committee.

### **Queen's or Prince's consent**

92 The need for Queen's or Prince's consent for a bill is separate from the issue of Crown application. For example, a bill may apply to the Crown in the sense of applying to government departments but may not need Queen's or Prince's consent because it does not affect the prerogative or interests of Her Majesty.

93 For more on Queen's or Prince's consent, see the Office Pamphlet *Queen's or Prince's Consent*.

## **D: OTHER ISSUES**

### **Partial application clauses**

94 Problems can sometimes arise<sup>48</sup> if a Crown application clause provides expressly for the application of a bill to the Crown in a particular respect but then goes on to provide expressly for the bill not to apply in another respect. The issue is what impact does this have on the presumption of non-application in a third respect which is neither expressly included nor excluded.

95 It seems that the law is reasonably robust on this. In *Lord Advocate v Dumbarton District Council*, Lord Keith of Kinkel said –

“The conclusion that the provisions in question do not bind the Crown is not, in my view, controverted by a consideration of section 146(1) of the Act, which

47. For the background to this practice, see M332/01 and 012. The position as stated in *paragraph 90* above results from correspondence in 2006 between this Office and the Treasury Solicitor. That correspondence may be found on M332/01.

48. See M332/03 although the potential for confusion in that case seemed minimal at best. The proposed new approach suggested in the papers does not seem to have become general practice.

provides in effect that nothing therein shall apply in relation to land belonging to the Crown. The argument is that any such express saving would be unnecessary if the Crown were immune. But, as Lord Du Parc explained in the *Province of Bombay* case [1947] A.C. 58, 65, such saving provisions are commonly inserted ex abundante cautela, and are not apt to support the inference that the Crown was in other respects intended to be bound.”

96 The point was also dealt with in *Hornsey Urban District Council v Hennell*.<sup>49</sup> In that case, it was argued that, there being certain specified exemptions in the Act under review, those exemptions excluded the presumption of any exemptions other than the specified ones. The argument was rejected by the court citing three earlier cases and “the general doctrine of the immunity of the Crown applied notwithstanding the insertion of an express exemption clause as to certain matters”.

97 Conversely, where an Act contained a general saving for the Crown, it was held that this did not prevent a particular enactment within the Act from binding the Crown where it was clearly intended to do so.<sup>50</sup>

#### **Amendments of Acts**

98 Particular issues relating to Crown application can arise when a bill amends an earlier Act. For example, if the bill and the Act have express Crown application clauses, it is important to ensure that the clauses do not contradict each other so far as they relate to the amendments made by the bill to the Act.

99 Alternatively, if the bill is silent on Crown application, it will be necessary to consider whether this leaves the position sufficiently clear in relation to the amendments to the Act. For example, if the intention is for the amendments to bind the Crown, they will only do so if there is a necessary implication to that effect. Such an implication might, for example, be deduced if the Act being amended expressly binds the Crown and the amendments themselves only make sense as part of the provisions being amended. But much will depend upon the particular facts of each case.

100 A similar point applies if a bill and an earlier Act are to be construed as if provisions in the bill were contained in that Act.<sup>51</sup>

#### **Other members of the Royal Family**

101 There is no question of personal immunity from legislation for any member of the Royal Family<sup>52</sup> other than the Sovereign. This includes the Prince of Wales.

49.[1902] 2 KB 73.

50.*Stewart v River Thames Conservators* [1908] 1 KB 893.

51.For an example of this see clause 151(2) and (5) of the Education and Skills Bill (2007/08).

52.See para. 1.1.5.14A of the First Supplement to Craies (2005) which refers to the question of construction which arose on section 79(5) of the Marriage Act 1949 (“Nothing in this Act shall affect any law or custom relating to the marriage of members of the Royal Family”).



### Other basic privileges and immunities of the Crown

102 Until the enactment of the Crown Proceedings Act 1947, the Crown enjoyed three main privileges and immunities—

- the King can do no wrong;
- the King cannot be sued in his own courts; and
- the presumption that the King is not bound by statutes.

103 The first doctrine was a genuine non-waivable substantive immunity. It meant that the King was regarded as incapable of either committing, or authorising the commission of, any tort. He was also immune from criminal liability in relation to common law offences on the same principles supplemented by the twin constitutional rules that the sovereign is deemed to be injured by every public wrong and that prosecutions are therefore brought in the name of the Crown. Immunity from statutory offences is conferred, in the absence of express provision or necessary implication, by the third doctrine.

104 The second doctrine was a waivable procedural immunity in the nature of a privilege. It derived from the notion that “the King hath no lord but God” and from the feudal principle that a lord could not be sued in his own court. It was tempered by the associated principle that the King was not above the law and that he therefore owed a duty to give redress to his subjects in those cases where redress would be available from a fellow subject. Accordingly, the King could, and generally would, waive his immunity from suit and allow proceedings to go ahead via procedures such as the petition of right.

105 So far as concerns the civil law, the Crown Proceedings Act 1947 largely obliterated the first two doctrines<sup>53</sup> but it left the third doctrine untouched.

### Non-Crown bodies and Crown employment

106 The Employment Appeal Tribunal found in *Adult Learning Inspectorate and others v Beloff*<sup>54</sup> that the employees of a non-departmental public body that was not a Crown body were nonetheless in Crown employment for the purposes of the Trade Union and Labour Relations (Consolidation) Act 1992. In establishing the Inspectorate, the Learning and Skills Act 2000 used standard wording for a statutory body that was not to have Crown status.<sup>55</sup> Despite this, the Tribunal found both limbs of the Crown employment definition in section 273(3) of the 1992 Act to be satisfied. As regards the second limb, the Tribunal was satisfied that a body could carry out functions on behalf of the Crown and yet not be the Crown’s servant or agent, nor enjoy Crown immunity. The judgment raises a question for drafters: should provision for non-Crown status include an express statement that employment by a statutory body is not Crown employment for the purposes of the 1992 Act?<sup>56</sup>

53. Although not in relation to Her Majesty in her private capacity (including the Duchies of Lancaster and Cornwall). In *M v Home Office* [1993] 3 All ER 537, Lord Templeton said at 540: “The judges cannot enforce the law against the Crown as monarch because the Crown as monarch can do no wrong.”

54. EAT/0238/07 (30/01/08). This case is discussed in Information Bulletin 03/04/08.

55. Paragraph 16 of Schedule 6 to the Learning and Skills Act 2000. See *paragraph 64*.

56. For more details see the Information bulletin of 03.04.08.

#### Other relevant case-law

107 The House of Lords in *Lord Advocate v Dumbarton District Council* rejected an argument that the presumption of Crown immunity only applies if an Act prejudicially affects the Crown by divesting it of some of its existing rights, interests or privileges (or, put another way, interferes with the Crown's lawful freedom of action).

108 The House of Lords, in rejecting this argument, felt that any investigation of prejudice could be a "difficult and inconvenient process" and that a statute must, in the absence of some particular provision to the contrary, bind the Crown either generally or not at all. It felt that, where the Crown is not expressly bound, there is no room at all for the view that it is not bound by necessary implication when acting within its rights but is so bound when acting without any right. It also felt that it was illogical for the application of a statute to the Crown to depend not upon the terms of the statute but upon extraneous matters, i.e. the relevant common law rights of the Crown at the time.

109 In the same case, Lord Keith of Kinkel said –

“However, as the very nature of these appeals demonstrates, it is most desirable that Acts of Parliament should always state explicitly whether or not the Crown is intended to be bound by any, and if so which, of their provisions.”

110 This is, though, something of a counsel of perfection and, in practice, we still rely upon silence to ensure that an Act does not apply to the Crown. Part of the difficulty of doing otherwise would be that we would then need to spell out in every case the personal position of Her Majesty, and/or her private estates and the Duchy of Cornwall, in relation to the Act.

#### Other Office learning

*Office of the Parliamentary Counsel*

*(1 August 2008)*

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## APPENDIX - EXAMPLES OF CROWN APPLICATION CLAUSES

### “This Act binds the Crown”

#### General

1 Some Acts simply state, without exception, that they bind the Crown. For example, section 107 of the Access to Justice Act 1999 reads –

“This Act binds the Crown.”

2 Other examples include section 129 of the Land Registration Act 2002 and section 111(1) of the Planning and Compulsory Purchase Act 2004.

3 This is the general catch-all expression which catches the Crown in all its aspects.<sup>1</sup>

4 It embraces the Sovereign in person and all Crown servants<sup>2</sup> and other emanations of the Crown. It also embraces land and other property held by government departments and by the Sovereign in right of the Crown and in her private capacity.

5 It also embraces land and other property held in right of the Duchy of Lancaster. Indeed, a reference to anything done “by or on behalf of the Crown” is likely to include anything done by or on behalf of the Duchy of Lancaster even if the same Crown application clause elsewhere distinguishes between land belonging to the Sovereign in right of the Crown and land belonging to the Sovereign in right of the Duchy of Lancaster.<sup>3</sup>

6 It also embraces the lands of the Duchy of Cornwall. Such lands are, in the absence of express provision or necessary implication, exempt from the application of statute because of the Crown’s interest in them. However, if the provisions of a bill bind the Crown, they will also catch the Crown’s interest in the Duchy lands and so also bring the Duchy lands within their ambit.<sup>4</sup>

7 However, the starting point is that a reference to the Crown does not catch the Crown in right of an overseas territory or a Commonwealth government<sup>5</sup> unless the context suggests otherwise. But, if an Act extends to an overseas territory, the ambit of “the Crown” in relation to the Act will include the Crown in right of the government of that territory.<sup>6</sup>

8 A reference to the Crown is wide enough to catch the Crown in right of the Scottish Administration and other devolved administrations as well as the Crown in right of Her Majesty’s government in the United Kingdom but it will be a matter of construction in each

1. See, for example, M332/04.

2. Compare section 50(4) of the Violent Crime Reduction Act 2006 which provides that “section 35 binds persons in the service of Her Majesty” and then defines, for particular purposes, when a person is in such service.

3. See M332/03.

4. See A29.13.17.

5. See M332/07.

6. See, for example, *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta* [1982] 2 All ER 118 (CA) and *R (on the application of Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 3 All ER 111 (HL).

case whether this extended meaning is relevant and applicable.

*Exception for Her Majesty in her private capacity*

9 It is fairly common to see an exception from a general statement that an Act binds the Crown for Her Majesty in her private capacity. See, for example, section 38(1) of the Food Standards Act 1999—

“38.-(1) This Act binds the Crown (but does not affect Her Majesty in her private capacity).”

10 Section 38(2)(b) of the Food Standards Act 1999 goes on to define “Her Majesty in her private capacity” by reference to section 38(3) of the Crown Proceedings Act 1947 (which provides that any reference to His Majesty in his private capacity includes a reference to His Majesty in right of His Duchy of Lancaster and to the Duke of Cornwall).

11 Other examples of this exception include—

- section 45D of the Medical Act 1983 (as inserted by the Health and Social Care Act 2008),
- section 38 of the Traffic Management Act 2004,
- section 150 of the Railways Act 1993,
- section 222(6) of the Water Resources Act 1991 (as substituted by the Environment Act 1995),
- section 51(7) of the Safeguarding Vulnerable Groups Act 2006, and
- sections 96 and 122 of the Health and Social Care Act 2008.

12 A similar result appears to have been attempted by a different route in section 50 of the Inquiries Act 2005 where the exception is worded “(but do not affect Her Majesty in her personal capacity or in right of Her Duchy of Lancaster or the Duke of Cornwall)”.

13 The reference to the Duke of Cornwall in all of these provisions is, at first sight, slightly surprising because it appears to be a blanket exception for the Duke of Cornwall personally whereas the Duke of Cornwall should only be excepted so far as the Crown’s interests in the Duchy are concerned.

14 However, nothing turns on the point because the exception is an exception from the proposition that the Act binds the Crown. So far as the Crown’s interests in the Duchy are engaged, the Duke of Cornwall is excepted from the proposition. So far as the Crown’s interests in the Duchy are not engaged, the proposition is not relevant because the Crown is not in the picture, the exception has nothing to bite on and the Duke of Cornwall is bound by the statute along with everybody else.

*Exception for criminal offences*

15 “This Act binds the Crown” appears to make the Crown criminally liable, whether Her Majesty herself, government Ministers or Crown servants and whether acting in the course of their official duties or not.

16 The result is that often there will be an exception for criminal offences committed by some or all aspects of the Crown (the peculiar position of Her Majesty is discussed below).

17 For example, section 84 of the Anti-social Behaviour Act 2003 reads—

- 84.-(1) This Part and any provision made under it bind the Crown.  
(2) This section does not impose criminal liability on the Crown.  
(3) Subsection (2) does not affect the criminal liability of persons in the service of the Crown.”<sup>7</sup>

18 This section appears to absolve the Crown itself from criminal liability but to ensure that persons in the service of the Crown can be criminally liable (whether acting in the course of their official duties or not).

19 It seems that “persons in the service of the Crown” will include Ministers<sup>8</sup> as well as their civil servants.

20 As a matter of drafting, it might be thought to be unsatisfactory that the exception in subsection (2) includes so much less than the exception in subsection (3) to that exception. However, the alternative would be to try to spell out the residual exception in subsection (2) once everyone caught by subsection (3) has been removed from it. This would be difficult to achieve and would involve mentioning Her Majesty expressly.

21 A similar provision is section 43 of the Countryside and Rights of Way Act 2000—

- “43.-(1) This Part binds the Crown.  
(2) No contravention by the Crown of any provision of this Part shall make the Crown criminally liable; but the High Court may declare unlawful any act or omission of the Crown which constitutes such a contravention.  
(3) The provisions of this Part apply to persons in the public service of the Crown as they apply to other persons.”

22 This section appears to achieve the same result as section 84 of the Anti-social Behaviour Act 2003 but it also provides for a declaration of unlawfulness in relation to any contravention by the Crown.

23 See also—

- section 45D of the Medical Act 1983, as inserted by the Health and Social Care Act 2008 (provision applying also to Scotland),
- section 60 of the Animal Welfare Act 2006,
- section 23 of the Health Act 2006, and
- sections 96 and 122 of the Health and Social Care Act 2008.

24 Sometimes, an Act will state who may make an application for a declaration of

7. In a similar vein, see section 60 of the Commons Act 2006.

8. In *Bank voor Handel en Scheepvaart, NV v Administrator of Hungarian Property*, the House of Lords made it clear that Ministers of the Crown were servants of the Crown (see, for example, (1954) All ER, Vol 1, 969 at 981-2).

unlawfulness. See, for example –

- section 221(2) of the Water Industry Act 1991, and
- clause 88(4) of the Pensions Bill (2007/08) (which provides for an application to the High Court or the Court of Session).

25 Section 51 of the Safeguarding Vulnerable Groups Act 2006 provides –

- “51.-(1) Subject to the provisions of this section, this Act and any regulations or orders made under it bind the Crown.
- (2) No contravention by the Crown of any provision of this Act or of any regulations or order made under it makes the Crown criminally liable.
  - (3) Despite subsection (2), this Act and any regulations or orders made under it apply to persons in Crown employment (within the meaning of the Employment Rights Act 1996 (c. 18)) as they apply to other persons.
  - (4) Subsection (2) of section 6 does not apply in relation to any activity carried out by the Crown.
  - (5) Each government department and other body performing functions on behalf of the Crown –
    - (a) if the department or body engages in regulated activity, is the regulated activity provider in relation to the activity;
    - (b) if the department or body engages in controlled activity, is the responsible person (within the meaning of section 23) in relation to the activity.
  - (6) In subsection (5) “body” includes office-holder.
  - (7) Nothing in this section is to be taken as in any way affecting Her Majesty in her private capacity (within the meaning of section 38(3) of the Crown Proceedings Act 1947 (c. 44)).”

26 Sometimes, an Act will explain the relationship between propositions similar to subsections (2) and (3) of section 43 of the 2000 Act. For example, section 221(3) of the Water Industry Act 1991 states that the equivalent subsection (3) proposition is notwithstanding anything in the equivalent subsection (2). Another example is section 73 of the Competition Act 1998 which makes it clear that the exception of no criminal liability for the Crown does not affect the application of any provision of the Act in relation to persons in the public service of the Crown. On a similar vein see section 60(3) of the Animal Welfare Act 2006.

27 An example of an exception for the Crown from criminal liability which is not itself subject to an exception is section 38 of the Traffic Management Act 2004 –

- “38.-(1) This Part and any provisions made under it bind the Crown (but do not affect Her Majesty in her private capacity or in right of Her Duchy of Lancaster or the Duke of Cornwall).
- (2) Nothing in subsection (1) is to be construed as authorising the bringing of proceedings for a criminal offence against a person acting on behalf of the Crown.”

28 Where an Act is otherwise applied to the Crown, there are many examples of an express exception which has the effect (often along with other effects) of protecting Her Majesty from criminal prosecution.

### *Other exceptions*

31 Numerous other exceptions are possible from the general statement that an Act binds the Crown.

32 Examples include—

- a power of the Secretary of State to certify in the interests of national security that powers of entry are not exercisable in relation to Crown land;<sup>11</sup>
- powers in respect of certain Crown land to be exercisable only with the consent of an appropriate authority;<sup>12</sup>
- an exception for a power of entry in relation to any motor vehicle in the public service of the Crown;<sup>13</sup>
- an exception for any penalty under the Act;<sup>14</sup>
- an exception for a particular penalty under the Act;<sup>15</sup>
- an exception for anything done on, or in relation to any use of, premises occupied (temporarily or permanently) by Her Majesty's naval forces, military forces or air forces;<sup>16</sup> or
- an exception for a land transaction under which the purchaser is a Minister of the Crown etc.<sup>17</sup>

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11. For examples of this sort of provision, see: section 221(4) of the Water Industry Act 1991; section 60(1) of the Health Act 2006; section 60(4) to (6) of the Animal Welfare Act 2006 (this also included an exception in relation to land belonging to Her Majesty in right of Her private estates (as defined in section 60(7))); section 96(5) of the Health and Social Care Act 2008.

12. See section 221(6) of the Water Industry Act 1991 or section 73(4) and (5) of the Competition Act 1998.

13. See section 196(4) of the Transport Act 2000.

14. See section 73(1)(b) of the Competition Act 1998.

15. An example is section 55A of the Data Protection Act 1998, inserted by the Criminal Justice and Immigration Act 2008. Section 55A(9) defines "data controller" in that section as not including the Crown Estate Commissioners or the persons covered by section 63(3) - that is, officials of the Royal Household and the Duchies of Lancaster and Cornwall.

16. See section 354(2) of the Gambling Act 2005.



### *Expansion of the expression*

33 It is far less common to find an Act that seeks to expand upon the meaning of the expression, "this Act binds the Crown".

34 One expansion that is sometimes found is to provide that the Act "and any provisions made under it" bind the Crown. See, for example, section 50 of the Inquiries Act 2005, section 38 of the Traffic Management Act 2004, section 51(1) of the Safeguarding Vulnerable Groups Act 2006 and section 60(1) of the Animal Welfare Act 2006.

35 An example of a provision that proceeds from another direction is section 38(2) of the Food Standards Act 1999 which provides that a statement that the Act binds the Crown "does not require subordinate legislation made under this Act to bind the Crown". Another example of this sort of provision is section 96(2)(a) of the Health and Social Care Act 2008.

36 However, there are also many Acts that expressly state that they bind the Crown but where nothing is said as to what this means for powers to make provision under them.

37 There is therefore no common approach as to whether anything needs to be said in these circumstances and, if so, what.<sup>18</sup>

### **Application of Acts to different types of land**

#### *General*

38 Various Acts make provision for their application in relation to different types of Crown land.

39 For example, section 195(1) and (2) of the Licensing Act 2003 read –

“195.–(1) This Act binds the Crown and has effect in relation to land in which there is –

- (a) an interest belonging to Her Majesty in right of the Crown,
- (b) an interest belonging to a government department, or
- (c) an interest held in trust for Her Majesty for the purposes of such a department.

(2) This Act also applies to –

- (a) land which is vested in, but not occupied by, Her Majesty in right of the Duchy of Lancaster, and
- (b) land which is vested in, but not occupied by, the possessor for the time being of the Duchy of Cornwall.”

40 Or section 327(1) of the Highways Act 1980 reads –

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<sup>18</sup> See section 107(2) of the Finance Act 2003.

- “327.-(1) The provisions of this section apply in relation to any land belonging to Her Majesty in right of the Crown or of the Duchy of Lancaster, or belonging to the Duchy of Cornwall, or belonging to a government department, or held in trust for Her Majesty for the purposes of a government department.
- (2) The appropriate authority in relation to any land and a highway authority may agree that any provisions of this Act specified in the agreement shall apply to that land....
- (3) ...
- (4) In this section “the appropriate authority” means –
- (a) in the case of land belonging to Her Majesty in right of the Crown, the Crown Estate Commissioners or other government department having the management of the land in question;
  - (b) in the case of land belonging to Her Majesty in right of the Duchy of Lancaster, the Chancellor of that Duchy;
  - (c) in the case of land belonging to the Duchy of Cornwall, such person as the Duke of Cornwall, or the possessor for the time being of the Duchy of Cornwall, appoints;
  - (d) in the case of land belonging to a government department or held in trust for Her Majesty for the purposes of a government department, that department;
- and, if any question arises as to what authority is the appropriate authority in relation to any land, that question shall be referred to the Treasury, whose decision shall be final.”

*Distinguishing the private estates from other Crown land*

41 The policy intention may be to apply a bill to Crown land generally, but to treat the private estates differently. The method used for doing this will depend upon the department’s instructions.<sup>19</sup>

42 There are two possible methods for treating the private estates differently.

- (1) The first is a method like that in section 154 of the Rent Act 1977. This does not apply to Crown land generally, but picks out “interests in right of the Crown”.
- (2) The second is to apply a bill to Crown land generally and then to carve out an exception for the private estates. In that situation, a bill may need to distinguish between the private estates and lands held in right of the Crown. An example of general application with provision distinguishing categories of land appears in the Town and Country Planning Act 1990, as amended by the Planning and Compulsory Purchase Act 2004.

43 In the Town and Country Planning Act 1990, section 292A provides for the Act to bind the Crown subject to the provisions of the Part. Section 293 sets out relevant definitions.<sup>20</sup>

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20. Similar provision is made in clause 212 of the Planning Bill (2007/08). That clause, in defining a Crown interest, covers the Scottish Administration and office-holders in the Scottish Administration.

“293. (1) In this Part—

“Crown land” means land in which there is a Crown interest or a Duchy interest;

“Crown interest” means any of the following—

- (a) an interest belonging to Her Majesty in right of the Crown or in right of Her private estates;
- (b) an interest belonging to a government department or held in trust for Her Majesty for the purposes of a government department;
- (c) such other interest as the Secretary of State specifies by order;

“Duchy interest” means an interest belonging to Her Majesty in right of the Duchy of Lancaster or belonging to the Duchy of Cornwall;

“private interest” means an interest which is neither a Crown interest nor a Duchy interest.

(2) For the purposes of this Part “the appropriate authority”, in relation to any land—

- (a) in the case of land belonging to Her Majesty in right of the Crown and forming part of the Crown Estate, means the Crown Estate Commissioners;
- (b) in relation to any other land belonging to Her Majesty in right of the Crown, means the government department having the management of that land;
- (ba) in relation to land belonging to Her Majesty in right of Her private estates means a person appointed by Her Majesty in writing under the Royal Sign Manual or, if no such appointment is made, the Secretary of State;
- (c) in relation to land belonging to Her Majesty in right of the Duchy of Lancaster, means the Chancellor of the Duchy;
- (d) in relation to land belonging to the Duchy of Cornwall, means such person as the Duke of Cornwall, or the possessor for the time being of the Duchy of Cornwall, appoints;
- (e) in the case of land belonging to a government department or held in trust for Her Majesty for the purposes of a government department, means that department;
- (f) in relation to Westminster Hall and the Chapel of St Mary Undercroft, means the Lord Great Chamberlain and the Speakers of the House of Lords and the House of Commons acting jointly;
- (g) in relation to Her Majesty’s Robing Room in the Palace of Westminster, the adjoining staircase and ante-room and the Royal Gallery, means the Lord Great Chamberlain.

(2A) For the purposes of an application for planning permission made by or on behalf of the Crown in respect of land which does not belong to the Crown or in respect of which it has no interest a reference to the appropriate authority must be construed as a reference to the person who makes the application.

(3) If any question arises as to what authority is the appropriate authority in relation to any land, that question shall be referred to the Treasury, whose decision shall be final.

(3A) References to Her Majesty’s private estates must be construed in accordance with section 1 of the Crown Private Estates Act 1862.

(3B) In subsection (2A) the Crown includes—

- (a) the Duchy of Lancaster;
- (b) the Duchy of Cornwall;
- (c) a person who is an appropriate authority by virtue of subsection (2)(f) and

(g).

- (4) ....
- (5) An order made for the purposes of paragraph (c) of the definition of Crown interest in subsection (1) must be made by statutory instrument.
- (6) But no such order may be made unless a draft of it has been laid before and approved by resolution of each House of Parliament.

*"land in which there is a Crown interest"*

44 The meaning of "land in which there is a Crown interest", in section 293(1) of the Town and Country Planning Act 1990 (before amendment by the 2004 Act), was considered cursorily in *Mid-Devon District Council v First Secretary of State*.<sup>21</sup> The court found that the private owners' licence to MAFF contractors to carry out works on their land did not amount to such an interest in land.

#### **Section 22 of the Agriculture (Safety, Health and Welfare Provisions) Act 1956**

- 45 Section 22 of the Agriculture (Safety, Health and Welfare Provisions) Act 1956 reads –
- "22. Sections one, two and six of this Act and regulations under any of those sections shall, in so far as they impose duties failure to comply with which might give rise to a liability in tort, be binding upon the Crown."

46 This therefore does not catch Her Majesty in her private capacity or in her capacity as Duke of Lancaster or Duke of Cornwall (see sections 22(2), 38(3) and 40(1) of the Crown Proceedings Act 1947).<sup>22</sup>

#### **Section 1(2)(b) of the Corporate Manslaughter and Corporate Homicide Act 2007**

47 Section 1(2)(b) of and Schedule 1 to the Corporate Manslaughter and Corporate Homicide Act 2007 enable the government departments or bodies listed in that Schedule to be prosecuted for the offence of corporate manslaughter or corporate homicide under section 1 of that Act.

48 Section 11 provides that-

- (a) a servant or agent of the Crown is not immune from prosecution under the Act for that reason (subsection (1));
- (b) a department or other body listed in Schedule 1 or a corporation that is a servant or agent of the Crown is to be treated as owing whatever duties of care it would owe if it were a corporation that was not a servant or agent of the Crown (subsection (2)); and
- (c) for the purposes of sections 2 to 7 anything done purportedly by a department or other body listed in Schedule 1, although in law by the Crown or by the holder of a particular office, is to be treated as done by the department or other body itself (subsection (4)).

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21. [2004] EWHC 814 (Admin). [4]-[6]. The works were the creation of an animal carcass holding centre.  
22.M 332/02.

49 The following sections of the Act relating to the section 1 offence may also be of interest: sections 12 (application to armed forces), 17 (DPP's consent required for proceedings), 18 (no individual liability) and 28(3) (extra-territorial application of section 1 in certain cases).

#### **Further examples**

50 For further examples of Crown application provisions, see para 11.5.14A of the First Supplement to Craies (2005). As noted there, the examples illustrate the range of potential complexities of Crown application and the fact that the possible permutations of policy are endless. It is therefore impossible to devise a single precedent to fit all occasions.

**Appendix M**

**John Kirkhope**

**v**

**Information Commissioner**

**and**

**The National Archives**

**(EA/2011/0185)**



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**Case No. EA/2011/0185**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notice No: FS50348825  
Dated: 26 July 2011**

**Appellant: John Kirkhope**

**First Respondent: Information Commissioner**

**Second Respondent: The National Archives**

**Date of hearing: 7 and 8<sup>th</sup> February 2012 in Central London CJC  
23<sup>rd</sup> May 2012 at Field House**

**Date of decision: 15 January 2013**

**Before**

**Anisa Dhanji  
Judge**

**and**

**Mr Andrew Whetnall  
Mr Michael Hake  
Panel Members**

**Representation**

For the Appellant: Joseph Barrett, Counsel  
For the First Respondent: Robin Hopkins, Counsel,  
For the Second Respondent: Jonathan Swift QC, and Amy Rogers, Counsel

**Subject matter**

FOIA section 40(2) - whether information is personal data; whether disclosure would breach the first data protection principle  
FOIA section 41(1) - whether disclosure of the information would constitute an actionable breach of confidence.

## **Authorities**

### Core legislation

Data Protection Act 1998, section 1, Schedule 1, Schedule 2

European Convention on Human Rights, Articles 8 and 10

Freedom of Information Act 2000, sections 40, 41

### Other legislation

Administration of Estates Act 1925, section 46

Civil List Act 1952, section 2

Commissioners of Revenue and Customs Act 2005, sections 18, 19 and 23

Crown Proceedings Act 1947, sections 38(3) and 40(2g)

Duchy of Cornwall, Management Act 1863, section 38

Finance Act 1989, section 182

Great Charter 1337

Human Rights Act 1998, sections 2, 3 and 6

Inheritance Taxes Act 1984, section 49

Official Secrets Act 1911, section 2 (now repealed)

Official Secrets Act 1989

Public Records Act 1958, sections 3, 5, 10

Taxation of Chargeable Gains Act 1992, sections 60 and 80

Taxes Management Act 1970, section 6 and Schedule 1

### Case law

A G v Sir John St. Aubyn and others (1811) (Wight 167)

A G v Mayor and Commonalty to the Borough of Plymouth (1754) (Wight 134)

Anderson v IC & Parades Commission EA/2007/0103, 29 April 2008

Attorney General v Observer Ltd 1990] 1 AC 109

Bluck v IC & Epsom NHS Trust [2011] 1 Info LR 1017

British Union for the Abolition of Vivisection v The Home Office and the Information Commissioner [2008] EWCA Civ 870

Bruton v IC & Duchy of Cornwall EA/2010/0182

Campbell v MGN [2004] 2 AC 457

Chasyn v Stourton (1553) (1 Dyer 94a) (73 ER 205)

Coco v AN Clark (Engineers) Limited [1968] FSR 415

Commissioners for HMRC v Banerjee [2009] 3 All ER 930

Common Services Agency v Scottish Information Commissioner [2011] 1 Info LR 184

Corporate Officer of the House of Commons v IC & Ors [2008] EWHC 1084

Derry City Council v IC [2011] 1 Info LR 1105

Douglas v Hello (No 3) [2008] 1 AC 1

Durant v FSA [2004] FSR 28

Higher Education Funding Council v IC & Guardian News, EA/2009/0036, 13 January 2010

Hobbs v Weeks (1950) (100 L.J. 178)

Home Secretary v BUAV & IC [2008] EWHC 892 (QB)

Corporate Officer of the House of Commons v IC and Norman Baker MP [2011] 1 Info LR 935

HRH The Prince of Wales v Associated Newspapers Ltd [2008] Ch 57

Imerman v Tchenguiz and Others [2011] Fam 116

In Re S (A Child) (Identification: Restrictions on Publication) [2005] 1 AC 593



Johnson v Medical Defence Union [2008] Bus LR 503  
Kennedy v Charity Commission and Information Commissioner [2012] 1 WLR 3524  
Kennedy v Charity Commission EA/2008/008  
Mayor of Penryn v Holm (1876-1877) (L.R. 2 Ex. D.)  
McKennit v Ash [2008] QB 73  
Padfield v Minister of Agriculture, Fisheries & Food [1968] AC 997  
PricewaterhouseCoopers v IC & HMRC [2011] UKUT 372 (AAC), 13 September 2011  
R (on the application of Wilkinson) v Inland Revenue Commissioners [2005] 1.W.L.R. 1718  
R v Braintree DC ex p Halls (2000) 32 HLR 770  
R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed & Small Businesses Limited [1982] 1 AC 617  
R v IRC, ex p National Federation of Self-Employed & Small Businesses Ltd [1982] 1 AC 617  
Rowe v Brenton (1828) 8 Barnewell and Cresswell 737  
Solicitor to the Duchy of Cornwall v Canning (1880) (5 P.D. 114 Probate)  
Sugar v BBC [2012] 1 WLR 439  
The Prince's Case (1606) (8 Co. Rep 1)  
The Sunday Times v United Kingdom (1979) 2 EHRR 245

#### Strasbourg authorities

Fressoz & Poire v France (2001) 31 EHRR 28  
Kenedi v Hungary [2009] ECHR 786  
Niemietz v Germany (1993) 16 EHRR 97  
Plon v France (2004) ECHR 200  
Standard Verlags GmbH v. Austria (no. 3) (Appln 34702/07), 10 January 2012  
Tarsasag a Szabadsagjogokert v Hungary (2011) 53 EHRR 3  
TietosuojaValtuutettu v Satakunnan Markkinapörssi Oy (C-73/07) (2010) (2008) ECR. I-9831  
Von Hannover v Germany [2005] 40 EHRR 1  
Z v Finland (1998) 25 EHRR 371

#### **OTHER MATERIAL**

##### Textbooks

Halsbury's Laws volume 12(1), paragraphs 80 and 320  
Information Rights: Law and Practice, 3<sup>rd</sup> ed, Coppel, Hart 2010, 25-038  
Simon's Taxes A3.412  
The Constitutional Position of the Prince of Wales P.L. 1995, Aut 401-413

##### Other

[www.duchyofcornwall.org/abouttheduchy.htm](http://www.duchyofcornwall.org/abouttheduchy.htm)  
[www.princeofwales.gov.uk/finances/expenditure](http://www.princeofwales.gov.uk/finances/expenditure)

Parliamentary Report of the Select Committee on the Civil List 1971 – 1972  
House of Commons Public Accounts Committee Investigation into the Duchies of Cornwall and Lancaster - Oral Evidence 7th February 2005

**DECISION**

The Tribunal upholds the Decision Notice dated 26 July 2011 and dismisses the appeal.

**The Confidential Annex**

Annex A will not be provided to the Complainant, nor published with the determination on the Tribunal's website or elsewhere.

**Signed**

**Anisa Dhanji  
Tribunal Judge**

**REASONS FOR DECISION**

**Introduction**

1. This is an appeal by Mr John Kirkhope (the “Appellant”), against a Decision Notice issued by the Information Commissioner (the “Commissioner”), on 26 July 2011.
2. The Appellant requested access, under the Freedom of Information Act 2000 (“FOIA”), to a closed file held by the National Archives (“TNA”) concerning the liability of the Duchy of Cornwall to tax. The content of this file comprises the disputed information in this appeal.
3. TNA is a government department and an executive agency of the Ministry of Justice. It was formed in 2003, bringing together the Public Record Office (the “PRO”) and the Royal Commission on Historical Manuscripts. In 2006, it merged with Her Majesty’s Stationery Office and the Office of Public Sector Information. It holds and preserves material regarded as being of potential value for historical research and as a resource for government departments in relation to their past policies and decisions.
4. The Appellant seeks the disputed information as part of his research for a thesis on the constitutional treatment of the Duchy of Cornwall, through which he hopes to inform public knowledge and debate.
5. TNA refused the Appellant’s request. The Appellant complained to the Commissioner who upheld TNA’s decision. The Appellant has appealed to the First-tier Tribunal challenging the Commissioner’s decision.

**The Request for information**

6. The Appellant submitted his request for information to TNA on 13 March 2010. His request was for the file with the name “IR 40/16619 – Liability of the Duchy of Cornwall to tax: covering dates 1960-62”.
7. The file had been transferred to the Public Records Office (now TNA), by the Inland Revenue in 1996 along with a number of other files. The Inland Revenue successfully applied for extended closure of the file on the basis that it contained “personal tax information supplied in confidence”. The application was to close the file for 75 years to ensure that it was closed for the lifetime of the individuals to whom the tax information in the file related. The file is closed until 2038.
8. TNA refused the Appellant’s request on 30 March 2010, after consulting both HMRC and the Cabinet Office. TNA relied on the exemptions in FOIA sections 40(2) (personal data), and 41(1) (information provided in confidence).

9. On 19 April 2010, the Appellant requested an internal review. On 19 August 2010, TNA informed him that having conducted an internal review, it was maintaining its decision.

### **The Complaint to the Commissioner**

10. On 4 September 2010, the Appellant complained to the Commissioner under section 50 of FOIA. The Commissioner inspected the disputed information, and as part of his inquiries, he also contacted both HMRC and TNA.
11. The Commissioner decided that TNA had correctly applied section 40(2) of FOIA, and that the disputed information was exempt from disclosure under that provision. In particular, he found that:
- the disputed information comprised the personal data of the Prince of Wales in his capacity as Duke of Cornwall, as well as the personal data of Her Majesty the Queen.
  - the disputed information was passed to HMRC in the reasonable expectation that it would not be disclosed to the public. That expectation was reflected in TNA's approach to the closure of this file and others like it.
  - disclosure pursuant to the Appellant's request would breach that reasonable expectation and the privacy of the data subjects.
  - in the circumstances of this case, there were no countervailing legitimate interests sufficient to outweigh the detriment to the data subjects.
12. Having reached the view that the disputed information was exempt under section 40(2), the Commissioner considered that he did not need to go on to consider whether the exemption in section 41(1) was also engaged.

### **The Appeal to the Tribunal**

13. The Appellant has appealed to the Tribunal against the Decision Notice.
14. He says that the Commissioner's factual analysis and legal reasoning are flawed, in particular:
- the Commissioner erred in his analysis as to the nature, character and purpose of the Duchy. The Duchy is not an ordinary private estate and this has been recognised by the First-tier Tribunal in **Bruton v IC & Duchy of Cornwall**, which rejected the claim that the Duchy is a private estate as opposed to a public body, without a separate legal personality;

- the tax liability or exemptions of the Duchy, and its income as paid to the Prince of Wales (or to the Monarch during the minority of the Prince), cannot properly be regarded as personal data or private information;
  - the disputed information is not analogous to the tax details of an ordinary private tax payer, but relates to the taxation which HMRC chooses to levy, or more importantly refrains from levying, on public funds paid to the Queen and Prince of Wales because of their respective constitutional roles. The funds are deployed solely for public functions and official duties and pursuant to public interest;
  - any privacy or confidentiality interest is at best slight, and the extraordinarily privileged treatment which the Duchy's revenues are accorded should be exposed to public knowledge, debate and scrutiny; and
  - the Commissioner attached too much weight to privacy considerations, and too little weight to the public interest.
15. TNA was joined in the appeal as the Second Respondent. An oral hearing took place over two days, and the panel later reconvened for a third day to hear arguments in relation to section 10 of the European Convention on Human Rights ("ECHR") following promulgation of the decisions in **Kennedy v Charity Commission** and **Information Commissioner**, and **Sugar v BBC**.
16. The parties have lodged extensive written material including a bundle containing more than 60 authorities, and much historical material. We were also referred to further authorities relating to Articles 8 and 10 of the ECHR. The Tribunal is grateful to the parties for their assistance. We have considered all the material before us, but have not attempted to refer to all of it in this determination, nor to every turn of argument, still less to attempt a summary of the long history of the Duchy and the tax treatment of its revenues.
17. During the course of the hearing, we heard evidence from the following witnesses:
- Sir Alex Allan
  - Ms Sue Walton
  - Ms Susan Healy
  - Sir Michael Peat
  - Sir Walter Ross
18. We have summarised their evidence below but record here our appreciation for the assistance the witnesses have provided to the Tribunal.
19. It may be convenient to mention here one matter in relation to the material placed before us. Just before the third day of the hearing, the Appellant, through his Counsel, lodged a witness statement from himself and certain

documents relating to other cases concerning FOIA and the constitutional position of the Prince of Wales. He also supplied a speaking note for his closing submissions which drew in part on these new materials. The late lodging of these papers was strongly resisted by TNA, on the grounds that its own witnesses had not had an opportunity to be questioned on the matters addressed in the new witness statement, and that there had been no opportunity to cross examine the Appellant on the opinions and facts belatedly presented. It was claimed that selections and extracts from evidence and expert witness statements submitted in another case which the Appellant was now seeking to rely on was similarly unbalanced and unfair, not least because of the limited time for other parties to consider them. The Tribunal does not adhere to strict rules of evidence, but is of course mindful of ensuring fairness to all parties. However, while we do not condone this late submission, we consider that the new material tends only to reinforce arguments already advanced. We do not consider that the other parties have suffered any real prejudice by the late admission of these papers, nor that the Appellant's position has been materially advanced by them.

### **The Tribunal's Jurisdiction**

20. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, he ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other Notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
21. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.

### **Issues**

22. The key issues before us in this appeal can be simply stated:
  - a. Is the disputed information exempt under section 40(2)? It will be exempt if the disputed information is personal data and if disclosure would breach any of the data protection principles.
  - b. If the information is not exempt under section 40(2), is it exempt under section 41(1) on the basis that disclosure would amount to an actionable breach of confidence?
23. It may be helpful to mention one issue that we will not be addressing. During the first two days of the hearing, Counsel for the Appellant argued that developments in the law expected shortly after the hearing may indicate an unqualified right to information under Article 10 of the ECHR in certain circumstances, including where information is sought by a public

watchdog or academic researcher. The foundation for this claim was strongly resisted by TNA. By the time the hearing reconvened for a third day, similar or comparable arguments had come before the Court of Appeal and the Supreme Court, which had decided that Article 10 was not engaged in the manner claimed by the Appellant. Recognising that we are bound by these decisions, the Appellant did not pursue the point and therefore, there is no issue before us to decide in relation to Article 10.

24. More generally, we would note that the Appellant has made wide-ranging submissions in relation to the specific constitutional and public status of the Prince of Wales in his capacity as heir to the throne and as Duke of Cornwall. We consider this to have been useful background material, but largely outside the scope of the issues we need to decide.

## **Evidence**

### **Overview – The Duchy**

25. The historical material before us spans nearly eight centuries since the Great Charter of 1337 (“the 1337 Charter”) that established the Duchy of Cornwall. The summary that follows is inevitably brief and intended only to provide a general context for the issues in this appeal. Where the matters referred to are not contentious, we have drawn, in part, on the summary in **Bruton** at paragraphs 33 et seq., as well as the summary set out in TNA’s Skeleton Argument.
26. HRH Prince Charles, the Prince of Wales, is the 24<sup>th</sup> Duke of Cornwall. The title “Duke of Cornwall” was created by Edward III under the 1337 Charter for his son, and for each future eldest surviving son of the Monarch and heir to the throne. The 1337 Charter provides that the eldest son of the Monarch, the heir apparent, succeeds to the title of Duke of Cornwall. With that title, come rights and responsibilities with respect to the Duchy. The Charter provides that the Duke is entitled to its income, net of all expenses, but not to the capital, thereby preserving the estate for his successors. When there is no Duke, the Duchy estate reverts to the Monarch and the annual Civil List is then reduced, by the amount of the income generated by the Duchy. If there is a Duke, but he is a minor, then eight-ninths of the net revenues from the Duchy estate are placed at the disposal of the Monarch and are again used to reduce her income from the Civil List.
27. The Duke as Prince of Wales does not receive funds from the Civil List. Instead, he derives an income from the Duchy which funds his public, charitable and private activities. Since 14<sup>th</sup> November 1969 (when he came into his majority), the Prince of Wales has been entitled to the entirety of the net revenues generated by the Duchy.
28. The Duchy is managed by the Duke, supported by the Prince’s Council which meets twice a year and provides advice to the Duke on the management of the estate. The Duchy publishes annual accounts which are submitted to the Treasury and then presented to Parliament.

29. The nature of the Duchy is a point in dispute between the parties. We note here that a differently constituted Tribunal concluded in **Bruton**, that the Duchy is a public authority for the purposes of the Environmental Information Regulations 2004. That decision is currently under appeal.
30. The Prince of Wales is liable to income tax on all of his income except for the income he receives from the Duchy. Following a Law Officer's Opinion in 1913 (reaffirmed by a further Law Officer's Opinion in 1921), no income tax has been levied on the revenue from the Duchy. The Appellant considers that the reasoning in the Law Officers' Opinions is inadequate and is based on an error as to the nature of the Monarch and the heir's rights in respect of the Duchy.
31. From the date of his majority in 1969 until his marriage in 1982, the Prince of Wales made a voluntary contribution to the Exchequer of 50% of the gross income he received from the Duchy each year. Thereafter, until 1993, he paid 25%. Since then, he has paid the sums set out in a Memorandum of Understanding between the Queen and the Prince of Wales in 1993, as varied on 23 July 1986 ("the MoU"). The MoU records, *inter alia*, that as of 6 April 1993, he would voluntarily pay income tax on income arising from the Duchy to the extent that this was not used to defray expenditure in connection with official duties.
32. The amount paid by the Duchy to the Duke annually is information that is available in the public domain, as is the portion of that income that is used for public functions and official duties, and the amount he pays to the Exchequer under the arrangement set out in the MoU.

#### The Disputed Information

33. As in all FOIA cases, the requester does not see the disputed information and cannot know, therefore, the extent to which his arguments are fully relevant to the disputed information. The absence of even a summary of the disputed information can compound the difficulties for a requester in such circumstances. That has certainly, in our view, been an issue in the present case. To alleviate the problem, in part at least, we encouraged TNA to provide the Appellant with a summary of the disputed information. This summary was produced at the hearing. We have reservations about what was produced (for reasons we made clear to TNA during the course of the hearing), and consider that it will not have enlightened the Appellant very far.
34. A detailed description of the disputed information and TNA's arguments referring to it, are set out in Annex A. Although we are obviously constrained in what we can say about the disputed information in this public part of the decision, we consider it important, in order to explain our findings in relation to the disputed information, that we should give at least a broad description of the information. Although we find, for the reasons set out below, that the disputed information is exempt, that finding relates to the specific content rather than the general nature of the disputed information, and what we say here does not transgress on those aspects we consider are exempt.



35. The papers comprising the disputed information date from 1960 to 1962. They concern certain specific revenue sources and involve exchanges between the Duchy's representatives and Inland Revenue officials, as well as internal exchanges and minutes between Inland Revenue officials discussing their responses to questions raised by the representatives of the Duchy. While they include the replies given by the Inland Revenue to questions raised, the file does not include a final substantive response on all the issues.
36. The disputed information can conveniently be divided into 3 groups, (1), (2), and (3). Groups (1) and (3) relate to income received by the Duchy from two different sources, respectively. With one exception relating to group (1), they do not mention any specific amounts of money. They also do not refer directly to disbursements of net revenues to the Duke or the Queen.
37. Group (2) comprising two letters, relates to the correspondence referred to above, but deals only with what might be described as a process issue about how those exchanges of communications should be dealt with.

#### Witness Evidence

38. The witnesses who gave evidence each lodged written statements. They were cross-examined in open sessions, save where certain parts of their evidence addressed the disputed information directly. Those parts were addressed in closed sessions, in the absence of the Appellant and his Counsel. We were mindful to ensure that the evidence heard in closed sessions was limited to matters dealing specifically with the disputed information.

#### Sue Walton

39. Sue Walton, Director of Central Policy in HMRC, explained HMRC's policy on the confidentiality of tax information. Confidentiality has long been fundamental to the relationship between members of the public and HMRC, and its predecessor, the Inland Revenue. The long-standing and consistent practice has been that discussions with individuals or with companies or other legal entities in relation to their specific tax affairs are treated as being in confidence. The confidentiality of tax records is a fundamental feature of the UK tax system, enshrined in legislation since at least the Income Tax Act of 1842, the rationale being to assure the public that personal details will remain confidential, and to help foster trust and candour between them and the tax authorities. Undermining this trust would make it significantly more difficult to collect tax.
40. When the disputed information was created, its confidentiality would have been protected under the Official Secrets Act 1911. The Taxes Management Act 1970 required tax inspectors and commissioners to take an oath of confidentiality and there is now a strict duty of confidentiality under the Commissioners for Revenue and Custom Act 2005, section 19 of which makes the disclosure of revenue and customs information relating to an identifiable individual without lawful authority, a criminal offence. Ms Walton believes that if the disputed information was still held by HMRC, its

disclosure would be a criminal offence, and this in turn would have engaged section 44(1)(a) of FOIA. An application for disclosure made to HMRC would have been refused.

41. Transfer of the file to TNA would have involved a process of selection assessing the historic value of the file. The IR 40 series concerned the general oversight of Inland Revenue taxes, and questions of taxation policy. In the main, such files deal with general points raised by individuals, professionals and representative bodies, and contain correspondence on such matters between the Board of Inland Revenue and central government. Guidance relevant to the time of transfer of the disputed information to TNA was contained in the PRO Manual of Records Administration 1993, exhibited to the statement of Susan Healy, and the files and records chapter of the Inland Revenue's Head Office Manual of 1996. This identifies records of significance relating to notable events or persons when the records add significantly to what is already known and are worthy of permanent preservation. Where such files contain personal or confidential information, an application would be made for extended closure beyond the usual 30 year closure period, and each year TNA would contact HMRC for guidance on any files due to become open, so that a sensitivity review could be carried out.
42. At the internal review stage, HMRC formed the view that the disputed information did not fall within the scope of section 41 of FOIA, and that the disputed information related to the Duchy and that the Duchy was wholly distinct from the Prince of Wales, so that section 40 of FOIA was not engaged. Following the advice of the Cabinet Office, HMRC revised this opinion, and by the time the internal review was completed, it was clearly of the view which it still maintains, that the disputed information comprises the personal data of the Prince of Wales, and that the information was clearly communicated in confidence with the expectation that it would not be disclosed.

#### Susan Healy

43. The witness statement of Susan Healy, on behalf of TNA, explains the policies and legal considerations relevant to holding files relating to personal taxation. She explains that extended closure of files in the IR 40 series is not unusual. With the aim of protecting the privacy of living individuals, those that contain personal tax information are generally subject to 75 year closure. More recently, a closure period of 84 years has been adopted reflecting changed lifespan assumptions. Of nearly 20,000 files in the series, 3,640 are closed, of which 2,877 are closed for 75 years.
44. She gives a chronology of the transfer of the file containing the disputed information to TNA in 1996, the procedures completed to ensure that the closure period (to 2038), was appropriate and consistent with policy, the facility to review this from time to time, and the consultative steps taken before decisions were made on the Appellant's application to see the file. Her witness statement also explains why she considers that there is no inconsistency in relation to other files relating to taxation matters and the Duchy that are open. For the most part, this is because older files relate to

earlier Dukes, no longer living. Later files do not contain the same level of detail on personal taxation matters as the closed file, and therefore do not display the same sensitivity which normally justify closure on grounds of privacy.

Sir Alex Allan

45. Sir Alex's evidence draws on his experience as a civil servant in HM Customs and Excise, the Treasury, the Cabinet Office and the Department of Constitutional Affairs, including periods where his duties, for example as Principal Private Secretary to the Prime Minister, included regular meetings with the Queen's Private Secretary and other periods of regular contact with the Royal Household.
46. Although not personally involved with the decisions or discussions on the Appellant's request, he reviewed the disputed information and the Cabinet Office records of the case. All Government Departments are under instruction from the Ministry of Justice to consult the Cabinet Office when considering FOI requests relating to the Royal Family, the Royal Household, or the Duchies of Cornwall or Lancaster. In such cases, the Cabinet Office liaises with the Royal Household, or through them, with the officers of the Duchy concerned, to obtain their views on the disclosure being sought. This is in line with general practice to consult third parties when requests are made for information relating to them. The Cabinet Office will take into account the views of the Household and Officers of the Duchy concerned, but will reach its own views on whether the information should be disclosed, and will advise the Government Department receiving the request accordingly.
47. In the present case, having been informed of the HMRC's view that the documents were exempt from disclosure under sections 40 and 41, the Cabinet Office consulted the Royal Household to ascertain its views, and established that the Household did not consent to disclosure. The Cabinet Office then confirmed to TNA that it concurred with the view that the information was exempt under sections 40 and 41.
48. The taxation of income received by the Prince of Wales from the Duchy is governed by the MoU, which includes provision that the Prince of Wales is entitled to the same privacy and confidentiality in respect of his tax affairs (including as to treatment of his income from the Duchy of Cornwall) as any other taxpayer. Sir Alex agrees with the position of the Cabinet Office, that the information contained in the file is private and confidential and that its disclosure would be an actionable breach of confidence. The information in the file relates to the Prince, and also to the Queen because during the Prince's minority, eight-ninths of the Duchy revenue was paid to the Sovereign. The first data protection principle would be breached by disclosure of the file.
49. This was the position of both HMRC and the Cabinet Office when the initial request for information was refused. When the Cabinet Office was consulted in the course of the internal review, HMRC's position, subject to the views of the Cabinet Office, had changed. They were content for the file to be

released and did not consider its content to be sensitive. The Cabinet Office strongly disagreed. In their view, this was not consistent with HMRC's general position on the confidentiality of taxpayer information. Having consulted again with the Royal Household, the Cabinet Office maintained its initial view. HMRC then reverted to its initial position. TNA, having considered the views of the HMRC and the advice of the Cabinet Office, also maintained its original position.

50. Sir Alex stresses the provisions in the Trustee Report and MoU, concerning the voluntary taxation arrangements agreed to by both the Queen and the Prince of Wales which give assurances on privacy and confidentiality. Paragraph 17 of the Trustees' Report provides that they "will be entitled to the same privacy and confidentiality in relation to their tax affairs as any other taxpayer. Accordingly the Government will not be publishing any information relating to monies paid under these voluntary arrangements." Paragraph 32 of the MoU repeats that privacy and confidentiality will be respected as for any other taxpayer "but this shall not preclude any exchange of information between the Treasury and the Inland Revenue which is necessary for the proper implementation of these arrangements." Sir Alex notes the principle of consistency of treatment in respect of the closure of archive files is also made clear in the Public Record Office's manual of Records Administration issued in 1993.
51. On the question whether the Duchy is a public body or a private estate, Sir Alex says that the advice given to him by officials in the Constitution Unit of the Cabinet Office, is that the Duchy of Cornwall is regarded by government as a private estate created to provide an income for each Duke of Cornwall. That this has been the Government view for a significant period is confirmed by answers to Parliamentary Questions in 1832, 2009 and 2011. Notwithstanding the First-tier Tribunal's decision in **Bruton** (which as already noted is under appeal to the Upper Tribunal), the Government remains of the view that the Duchy is, in general, a private estate.

Sir Michael Peat, GCVO

52. Sir Michael gave evidence based on his experience of having held various senior positions in the Royal Household as Director of Property Services, Treasurer to the Queen, Receiver General of the Duchy of Lancaster, Principal Private Secretary to the Prince of Wales, and his service on the Prince's Council. He is also a Fellow of the Institute of Chartered Accountants. He was closely involved with discussions relating to the 1993 Memorandum.
53. He says that the Duchy of Cornwall is not itself subject to taxation. This is not a matter of an exemption being applied, but reflects the fact that only natural and legal entities can be subject to taxation. The Duchy is not a separate legal entity, so for example it is not a corporation, and is not and never has been liable to corporation tax. The net revenue of the Duchy (ie total revenue after deducting costs and expenses), is paid to the person entitled to receive it at the relevant time, ie to the Duke of Cornwall if the Duke is in his majority, or the Sovereign if there is no Duke. When the Duke is a minor, eight-ninths is paid to the Sovereign and the balance to the Duke.

There is no question of capital gains liability because neither the Sovereign nor the Duke is entitled to the capital of the Duchy. The only issue of taxation which arises is whether the Duke or the Sovereign is liable to income tax on the revenue they receive from the Duchy. The arrangements for taxation at the present time are as set out in the MoU. Prior to the MoU, the Prince of Wales was liable to income tax on all of his income other than the income he received from the Duchy, such income being exempt from taxation by virtue of the "Crown exemption". However, he made a voluntary contribution to the Exchequer of 25% of the gross income he received from the Duchy each year. As from 6 April 1993 these voluntary payments ceased. Instead, the Prince voluntarily pays tax on the income arising from the Duchy to the extent that it is not used to defray expenditure in connection with his official duties, or official duties performed by the Princess of Wales/Duchess of Cornwall. Appendix B to the MoU contains rules for determining the amount of income to be taxed. Annual audited reports are published.

54. The Queen and the Prince of Wales expect to retain privacy and confidentiality in relation to their tax affairs in the same way as any other taxpayer. This was made clear in paragraph 32 of the MoU. Sir Michael says that the intention was to make the Queen and the Prince's tax affairs similar to those of other individuals. On the Appellant's observation that the title of the file containing the disputed information refers to "the liability of the Duchy of Cornwall to tax" and not "personal tax calculations relating to the Duke of Cornwall", Sir Michael observes that as the Duchy is not a legal entity for the purposes of taxation, it is "neither liable to pay tax nor exempt from paying tax in its own right". In practical terms the description "liability of the Duchy of Cornwall to tax" is a reference to taxation of the revenues in the hands of the Duke, or where relevant, the Sovereign. Any discussions with the HMRC conducted by or on behalf of the Duchy are therefore "conducted in order to establish the rights and obligations of the person entitled to receive the net income from the Duchy estate." The Duchy will, in effect, act as the agent of the taxpayer and the Prince of Wales' agents are subject to the same confidentiality provisions as their principals.

#### Sir Walter Ross KCVO

55. Sir Walter gave evidence as the Secretary and Keeper of the Records of the Duchy of Cornwall. He is also a member of the Prince's Council. To the extent that his witness statement confirms and supports that of Sir Michael Peat on the tax treatment and agreements set out in the MoU and expectations of confidentiality concerning dealings with the Revenue/HMRC, we do not repeat it here. Other key points he made are that the Dukedom is an hereditary title, that the Duke has no constitutional role, that the Duchy of Cornwall estate "is a collection of land and other capital assets which are bound together as 'the Duchy' under the 1337 Charter in order to generate an income for the benefit of present and future Dukes of Cornwall", that the Duke is entitled to the net revenues but not the capital assets of the Duchy (historically the assets were inalienable but this has been somewhat relaxed to facilitate practical estate management); that there are separate bank accounts for capital accounts or revenue accounts; that the Duke was

entitled to a revenue account surplus of £17.8m which was generated from capital assets valued at approximately £700m in 2011.

56. In Sir Walter's view, although the Appellant deals at length with the nature and activities of the Duchy of Cornwall estate, the majority of issues he raises are not relevant to the issues in the appeal. This should not be taken to mean that the Appellant's statements are correct. The Duchy of Cornwall estate is not publicly funded. Its principal activity is the sustainable and commercial management of estate land and properties (a mission statement to this effect is set out in the Annual Report and Accounts). The Commissioner was correct to describe the Duchy of Cornwall as a private estate of the Prince of Wales. The Duchy is managed by the Prince of Wales himself, supported by the Prince's Council acting effectively as an advisory board and by the offices of Secretary and Keeper of the Records and by the Receiver General of the Duchy who has oversight of the financial affairs of the estate.

## **Findings and Reasons**

### **Statutory Framework**

57. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.
58. The duty on a public authority to provide the information requested does not arise if the information sought is exempt under Part II of FOIA. The exemptions under Part II are either qualified exemptions or absolute exemptions. Information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Where, however, the information requested is subject to an absolute exemption, then, as the term suggests, it is exempt regardless of the public interest considerations.
59. In the present case, the Commissioner found that the disputed information was exempt under section 40(2) of FOIA. Under this provision, personal data of third parties is exempt if disclosure would breach any of the data protection principles set out in Part 1 of Schedule 1 of the Data Protection Act 1998 ("DPA"). The exemption is absolute.
60. The data protection principles regulate the way in which a "data controller" (in this case TNA), must "process" personal data. The word "process" is defined in section 1(1) of the DPA to include disclosure to a third party or to the public at large.
61. The first question to address is whether the disputed information is personal data. If it is not, then it is not exempt under section 40(2), and must be disclosed unless another exemption applies. TNA has also relied on section 41(1) (information provided in confidence), so if the disputed information is not exempt under section 40(2), we will still need to consider if it is exempt under section 41(1).

## General Findings

62. It may be helpful if we begin by addressing one point that has exercised the parties and on which they, and the Appellant in particular, have concentrated much of their evidence and arguments. It is about whether the Duchy is a separate legal entity with a distinct legal personality, and whether it is a public or private body. It is the Appellant's position, running throughout his arguments in this appeal, that the Duchy cannot properly be regarded as a private institution and therefore, any analogy with the position of a private taxpayer is entirely misconceived. Indeed, he says that it is the proper characterisation of the Duchy that unlocks this case. In support of his position the Appellant has put forward wide-ranging arguments and evidence, including as to the constitutional position of the Duke and Duchy.
63. The questions the Appellant raises as to the nature of the Duchy are not ones that lend themselves to easy answers. Indeed, we note that even the Appellant, whose considerable research and scholarship is evident, has not always claimed that the Duchy is a public body. In his article in the *Plymouth Law Review* in 2010 "*A Mysterious Arcane and Unique Corner of our Constitution*" *The Laws relating to the Duchy of Cornwall* (OB128), the assertion that the Duchy of Cornwall is a private estate is certainly questioned, but it is not argued that it is a public body in any ordinary sense of the term.
64. However, we consider that the issues in this appeal do not require us to make a finding as to the legal nature of the Duchy. The most we would say is that we agree that there is a likely valid distinction to be drawn between the Duchy as holder of assets in perpetuity and receiver of associated revenues, and the Duke or, in the minority of or absence of a Duke, the Sovereign, as the persons entitled to receive the revenues net of costs of maintaining the estate.
65. The reason that we do not need to go further is because whatever its status, and to whatever extent the disputed information relates to the Duchy, it relates to the Duchy as a receiver of revenues, rather than, for example, the Duchy as a contracting party. The disputed information concerns, for the most part, the taxation of those revenues. It is clear from the evidence that the Duchy is not itself taxed directly. Whether that position is correct and whether it should be taxed, are not questions relevant to this appeal. Sir Michael says, and we accept, that for practical purposes, the fact that the Duchy is not taxed directly means that the "liability of the Duchy of Cornwall to tax" (which is the title of the file the Appellant has requested), means that taxation of the Duchy's income is, in effect, taxation of that income in the hands of the Duke, or in certain cases, the Queen. Discussions with the Inland Revenue or HMRC conducted by or on behalf of the Duchy are effectively conducted in order to establish the rights and obligations of the person entitled to receive the net income from Duchy estate. Even if the Duchy, properly characterised, is a separate legal entity (of whatever description), the fact that all net revenues of the Duchy accrue for the benefit of the Duke, and at times, the Queen, means that any discussion about the

tax treatment of the Duchy's revenues relates to the Prince and the Queen. Our finding in this regard informs our approach on the key issues in this appeal, in particular, as to whether the disputed information is personal data, whether disclosure would breach any of the data protection principles, and whether the disputed information is exempt because disclosure would constitute a breach of confidence.

Is the disputed information personal data?

66. We turn now to consider whether the disputed information constitutes personal data. The legal definition of "personal data" as found in section 1(1) the DPA (and incorporated into FOIA by section 40(7)), is as follows:

*"personal data" means data which relate to a living individual who can be identified—*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;*

67. The DPA gives effect to Directive 95/46/EC of 24 October 1995 on The Protection Of Individuals With Regard To The Processing Of Personal Data And On The Free Movement Of Such Data which defines "personal data" as follows:

*"... any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity"*

68. In the Court of Appeal's decision in **Durant v Financial Services Authority** "personal data" was defined by Auld LJ as follows:

*"...not all information retrieved from a computer search against an individual's name or unique identifier is personal data within the Act. Mere mention of the data subject in a document held by a data controller does not necessarily amount to his personal data. Whether it does so in any particular instance depends on where it falls in a continuum of relevance or proximity to the data subject as distinct, say, from transactions or matters in which he may have been involved to a greater or lesser degree. It seems to me that there are two notions that may be of assistance. The first is whether the information is biographical in a significant sense, that is, going beyond the recording of the putative data subject's involvement in a matter or an event that has no personal connotations, a life event in respect of which his privacy could not be said to be compromised. The second is one of focus. The information should have the putative data subject as its focus rather than some other person with whom he may have been involved or some transaction*



*or event in which he may have figured or have had an interest, for example, as in this case, an investigation into some other person's or body's conduct that he may have instigated. In short, it is information that affects his privacy, whether in his personal or family life, business or professional capacity."*

69. If the disputed information is personal data, it is common ground between the parties that it must, at the least, be the personal data of the Duke of Cornwall and the Queen. They were the only people entitled to the net revenues of the Duchy at the relevant time. The Duke was a minor and therefore, the Queen was the beneficiary in respect of eight-ninths of the revenues and the Duke was entitled to the remaining ninth.
70. As to whether the disputed information is in fact personal data, the Respondents say that the question is essentially a simple one. The Duchy has no separate legal personality; it is a private estate. Since the only individuals entitled to benefit from the net revenues of the Duchy during the period covered by the disputed information were the Duke of Cornwall and the Sovereign, the information relating to the tax treatment of the revenues of the Duchy is, in effect, information about the financial affairs of the Duke and the Queen. It is their personal data.
71. The Appellant's main argument as to why the disputed information is not personal data is that the Duchy is not a private estate and that therefore, information concerning the tax liability of Duchy cannot properly be regarded as personal data or private information.
72. We have already found that a discussion about the tax treatment of the Duchy's revenues relates to the income of the Duke, and in some cases the Queen. As a result, any tax issues relating to the Duchy necessarily affects their income. Since there can be no doubt that a person's financial affairs constitutes his or her personal data, it follows that information about the tax affairs of the Duchy, amounts to the personal data of the Duke and the Queen. The information relates to them and they can be identified from it. It comes squarely within the definition of personal data in section 1 of the DPA. On the **Durant** test, the connection to the data subjects is not merely incidental. The information is about their income. The constitutional position of the data subjects and whatever legitimate public interest there may be in transparency about their financial affairs, may be relevant to the question of whether disclosure would breach any of the data protection principles. It is not relevant, however, to the question of whether the information is personal data.
73. We emphasise that our finding does not turn on the nature of the Duchy. Even if the Duchy, properly characterised, is a separate legal entity (of whatever description), the fact that all its net revenues accrue for the benefit of the Duke and Queen would mean that any discussion about the tax treatment of the Duchy's revenues in the Duchy's hands still relates to them. The tax treatment has a direct impact on their income and therefore, it still constitutes their personal data. This is regardless of whether the Duchy itself is characterised as a private estate or something else, and is regardless of

the historical and legal arguments advanced by the parties as to the status of the Duchy.

Would disclosure breach any of the data protection principles?

74. Having found that the disputed information is personal data, the next question is whether disclosure would breach any of the data protection principles.
75. In the case of the Queen, the fact that the Civil List is reduced by the amount received from the Duchy, that Civil List payments are intended solely to meet her public expenses as Head of State, and that the amount she receives from the Civil List is fully in the public domain, may support a different finding from the case of the Duke as to whether disclosure would breach the data protection principles. However, it is not a point that we need to decide. We have already found that the disputed information is also the personal data of the Duke and we must consider, therefore, whether disclosure in relation to him would breach the data protection principles, regardless of whether it would do so in relation to the Queen.
76. The parties agree that only the first data protection principle is relevant. This provides that personal data shall be processed fairly and lawfully, and in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met. In his Decision Notice the Commissioner concluded that disclosure of the disputed information would not be fair. He did not go on, therefore, to consider whether any conditions in Schedule 2 were met.
77. It is also common ground between the parties that the only relevant condition in Schedule 2 is in paragraph 6(1) which provides as follows:

*The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.*

78. “Necessary” in this context has been held to reflect the meaning attributed to it by the European Court of Human Rights when justifying an interference with a recognised right, namely that there should be a pressing social need and that interference must be both proportionate as to the means, and fairly balanced as to ends. See **Corporate Officer of the House of Commons v IC & Ors**, paragraph 43, and **The Sunday Times v United Kingdom**, paragraph 59.
79. It is clear from the wordings of condition 6(1), that when assessing whether the condition is met, the interests of the data subject as well as the data user (here, the Appellant), and where relevant, the interests of the wider public, must be taken into account. This balancing exercise is also necessary when assessing fairness. A wide approach to fairness is endorsed by the observations of Arden LJ in **Johnson v Medical Defence Union** at paragraph 141:

*“Recital (28) [of Directive 95/46] states that “any processing of personal data must be lawful and fair to the individuals concerned”. I do not consider that this excludes from consideration the interests of the data user. Indeed the very word “fairness” suggests a balancing of interests. In this case the interests to be taken into account would be those of the data subject and the data user, and perhaps, in an appropriate case, any other data subject affected by the operation in question.”*

Although that case concerned the provisions of the Freedom of Information (Scotland) Act 2002, the principles apply equally in relation to FOIA.

80. The following passage in **Corporate Officer of the House of Commons v IC and Norman Baker MP** at paragraph 28, also offers helpful guidance about the balancing exercise to be undertaken:

*“If A makes a request under FOIA for personal data about B, and the disclosure of that personal data would breach any of the data protection principles, then the information is exempt from disclosure under the Act: this follows from section 40(2) read in conjunction with section 40(3)(a)(i), or (when applicable) section 40(3)(b) which does not apply in these appeals. This is an absolute exemption - section 2(3)(f)(ii) FOIA. Hence the Tribunal is not required to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure under section 2(2). However... the application of the data protection principles does involve striking a balance between competing interests, similar to (though not identical with) the balancing exercise that must be carried out in applying the public interest test where a qualified exemption is being considered.”*

81. This does not mean, however, that one starts with the scales evenly balanced. The continued primacy of the DPA, notwithstanding freedom of information legislation, and the high degree of protection it affords data subjects has been strongly emphasised by Lord Hope in **Common Services Agency v Scottish Information Commissioner** where he states (at paragraph 7):

*“In my opinion there is no presumption in favour of the release of personal data under the general obligation that [FOIA] lays down. The references which that Act makes to provisions of DPA 1998 must be understood in the light of the legislative purpose of that Act .... The guiding principle is the protection of the fundamental rights and freedoms of persons, and in particular their right to privacy with respect to the processing of personal data.”*

82. The position is different however, where public officials are concerned and where the purpose for which the data are processed arise through the performance of a public function. As stated by the Tribunal in **Corporate Office of the House of Commons v IC and Norman Baker MP** at paragraph 77:

*“...when assessing the fair processing requirements under the DPA ... the consideration given to the interests of data subjects, who are public officials where data are processed for a public function, is no longer first or paramount. Their interests are still important, but where data subjects carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would the case in respect of their private lives. This principle still applies even where a few aspects of their private lives are intertwined with their public lives but where the vast majority of processing of personal data relates to the data subject’s private life.”*

83. We turn now to task of applying these principles in the present case.
84. The Respondents say that disclosure would be neither fair nor lawful. It would not be lawful because it would constitute a breach of confidence and potentially also an unjustified interference with the Duke’s rights under Article 8 of the ECHR.
85. They also say that disclosure would not be fair. They give two principal reasons for this. First they say that information about a person’s financial and tax affairs is, by its very nature, intensely private. That basic principle holds true regardless of whether or not the data subject is a member of the Royal family. HMRC’s long-standing practice has been to keep personal and commercial tax information strictly confidential, and both TNA and HMRC have treated the disputed information as confidential in the same way as they would for other individuals.
86. Second, the data subject would have had a reasonable expectation that the disputed information would be kept confidential. The correspondence in question dates from the early 1960s, some 40 years before the introduction of FOIA. There would have been no expectation on the part of anyone concerned that the information would enter the public domain. On the contrary, as is clear from Sir Michael’s evidence, the Prince and indeed the Queen, have always considered such information to be confidential and the Prince’s Household has also confirmed that he would not consent to disclosure.
87. In addition, the Respondents say that none of the conditions in paragraph 6(1) of Schedule 2 is satisfied. Whatever the Appellant’s interests in relation to his academic research might be, disclosure would prejudice the Duke’s right to privacy and confidentiality and this prejudice is unwarranted. Disclosure is not “necessary” for the purposes of any legitimate public interest. Given the extent of transparency that already exists concerning the principles of the Inland Revenue’s approach to the revenues of the Duchy in the hands of the Duke, there would be no incremental gain in public understanding from disclosure. Even if there is some legitimate interest in disclosure on the basis that the Duke uses a portion of his Duchy income to fund his official expenditure as Prince of Wales, it does not follow that disclosure is “necessary” for the purposes of any such interest. It is entirely for him how he chooses to spend the income he receives from the Duchy.

There is no requirement that he uses any part of that income for “official” purposes.

88. The Appellant’s arguments in favour of disclosure rest not so much on his own particular academic interests, but rather on the strong public interest he asserts exists in the disputed information being made public which he says clearly outweigh any privacy considerations. His arguments are wide-ranging. Amongst other things, he says that:
- the beneficiaries receive the income that the Duchy produces only in their public and official role. This means that there is a stronger and different public interest in transparency than if the Prince was an ordinary private tax-payer;
  - the disputed information relates to public money paid in respect of the performance of public functions and for this reason, too, there is a legitimate public interest in disclosure;
  - the Duchy is entirely funded by public money, both as regards the initial transfer of capital that was vested within it by Act of Parliament at its inception, and on an on-going basis (via tax-payer under-written exemptions from capital gains, income tax and corporation tax);
  - the Duchy enjoys a privileged tax position, and any papers showing whether such tax treatment has been reconsidered or reviewed, are of particular public interest. The historic arrangements (relating to a period more than 50 years ago) between two public bodies, the Duchy and the Inland Revenue, concerning this uniquely privileged tax position of the Duchy should be open to public discussion and scrutiny; and
  - there is a legitimate interest on the part of the public in being informed about the principles taken into account when deciding how matters relating to the taxation of Duchy revenues are settled and in transparency and accountability of HMRC performing its functions.
89. The Appellant also says that other documents relating to the tax status of the Duchy of Cornwall, created both earlier and more recently than the disputed information, are already in the public domain. He drew our attention to the open files on the tax status of the Duchy, including *inter alia*, the Law Officers’ opinions of 1913 and 1921, files on proposals for dealing with the taxation of the Duchy dated 9 years after the date of the file containing the disputed information, the Parliamentary Select Committee report on the Civil List of 1971/72, the Public Accounts Committee’s consideration of the taxation status of the Prince in 2005, the annually published Duchy Accounts, the Prince of Wales’ website and the Report of the Royal Trustees (Memorandum of Understanding on Royal Taxation) dated 11 February 1993. He argues that all these documents confirm that the tax status of the Prince as Duke of Cornwall is a matter of significant public interest, and that with the above information being already in the public domain, it is anomalous to refuse to disclose the disputed information on the basis of privacy considerations.

90. In reaching our findings we have carefully considered the arguments advanced by the parties, in light of the relevant case law referred to above, and the specific content of the disputed information.
91. As we have already noted, the disputed information can be conveniently divided into 3 groups. Groups (1) and (3) relate to income received by the Duchy from two specific sources, and group (2) comprises two letters dealing with what we have described as a process issue. We are satisfied, for the reasons set out below, that in respect of the information coming within groups (1) and (3), disclosure would not be fair and would not meet the conditions in paragraph 6(1) of Schedule 2. Having reached this finding we have not dealt here with whether disclosure would also be unlawful. The Respondents' argument in that regard is based on the assertion that disclosure would be a breach of confidence and we will deal with that issue in relation to section 41(1).
92. First, we find that there is a general presumption that the tax affairs of individuals are private to them. If this principle needs authority, we have been referred to the statement of Henderson J. in **Commissioners for HMRC v Bannerjee** at paragraph 34, where he states:
- "In my opinion any taxpayer has a reasonable expectation of privacy in relation to his or her financial and fiscal affairs, and it is important that this basic principles should not be whittled away."*
- Disclosure would clearly compromise the privacy interests of the Prince.
93. Notwithstanding that he disputes that the Prince should be treated like any other tax payer in relation to the income he receives from the Duchy, the Appellant quite fairly accepts that the "details of [his] income, reliefs and allowances may be confidential". He has also said that he is not interested in that type of information. What he is interested in is the basis upon which liability or non-liability to tax in respect of revenues from the Duchy is determined. He says, and we accept, that papers showing whether such tax treatment has been reconsidered or reviewed, are a matter of legitimate public interest. As already noted, the Appellant considers that the Law Officers' Opinion in 1913 (to the effect that the "crown exemption" applies so that the Duke is not liable to pay tax upon the Duchy's revenues), is flawed.
94. However, the disputed information in groups (1) and (3) does not deal with the question of liability to tax. It does not reflect a reconsideration or review of that tax treatment. It simply deals with the application of the known principle to two specific revenue streams and does not re-visit the principle itself. In our view the disputed information falls outside the scope of the Appellant's public interest arguments. It concerns specific details about the Prince's tax affairs, which we consider are confidential (and which we understand the Appellant accepts may be confidential) notwithstanding the Prince's public role.
95. Second, we consider that the Prince would have had a legitimate expectation that the disputed information would be kept confidential. Our finding in this regard is not based on TNA's argument that the disputed information came into being long before the introduction of Freedom of

Information legislation and there would have been no expectation, therefore, on the part of anyone concerned that the information could enter the public domain. That would be true of course of any pre-FOIA information and the argument cannot be used to thwart Parliament's intention in enacting FOIA.

96. It is also not based on the express expectation of confidentiality at paragraph 32 of the MoU which provides as follows:

*"In relation to anything done in respect of this voluntary agreement The Queen and The Prince of Wales shall be entitled to full privacy and confidentiality in the same way as any other tax payer; but this shall not preclude any exchange of information between the Treasury and the Inland Revenue which is necessary for the proper implementation of the arrangements."*

The MoU considerably post-dates the disputed information and cannot be taken to be evidence of the expectation at the time. The same is true of the report of the Royal Trustees dated 11 February 1993 which annexes the MoU and which reiterates the expectation that "the Queen and the Prince of Wales will be entitled to the same privacy and confidentiality in relation to their tax affairs as any other tax payer".

97. Rather, we consider that the reasonable expectation of confidentiality flows from the general presumption that the tax affairs of individuals are private. There is also evidence before us, in relation to the actual expectation as reflected in the contents of the disputed information, which contain an express expectation as to confidentiality.
98. The Appellant argues and we accept that there is no evidence of any loss or harm to the data subject that would arise from disclosure. However, there is no requirement that there be actual loss or harm. We are satisfied that disclosure of this type of information would compromise the data subject's privacy. We are not persuaded by the Appellant's argument that disclosure would not compromise his privacy because other related material is already in the public domain. The Appellant has pointed, in this regard, to a number of other files related to the Duchy in the public domain. However, we note that three of the five files relate to previous Dukes of Cornwall who are no longer alive. Two files, LCO2/5136 relate to a legal issue concerning the next of kin during the minority of the Duke of Cornwall and not to personal tax information. The fifth file relates to a proposal in 1969 concerning the proportion of the revenues of the Duchy of Cornwall which the Prince of Wales could be asked to surrender to the Civil List Consolidated Fund, in lieu of tax. Again, it does not relate to a discussion of the Prince's specific tax affairs. None of the information the Appellant refers to comprises correspondence with the tax authorities on particular tax issues.
99. Against these factors, we have considered whether and to what extent disclosure is "necessary" for the purposes of the legitimate interests of the Appellant or the wider public. As already noted, the Appellant relies not so much on his own interests, but the wider public interest. That public interest cannot of course be viewed in isolation but needs to be considered in the context of condition 6(1) and the specific content of the disputed information.

100. We would say at the outset that while we do not doubt that there is a legitimate public interest in disclosure of the disputed information, on the facts of this case, we do not consider that interest to be of the compelling nature that the Appellant asserts. While we accept the importance in terms of public interest of ensuring that the principles of taxation of members of the Royal family are clear and transparent, we do not consider that those interests are materially furthered in the case of the disputed information, or would add to any significant extent to what is already in the public domain. The information does not assist in understanding the justification for the tax treatment of the income. It does not address the principles of the treatment of Duchy revenues for tax purposes.
101. We also do not consider that the Appellant's arguments based on "public funding" or "public money" engage concepts that are particularly useful in the present case. As already noted, the disputed information concerns quite specific issues and does not deal with the general principles that underlie what the Appellant describes as the Duchy's privileged tax position.
102. To the extent that the Appellant argues that there is a public interest in the disputed information because the revenues of the Duchy are paid to the Prince in respect of the performance of public functions, we accept from the evidence before us that the income from the Duchy is not hypothecated to public functions and the Duke has discretion on how it is spent. Indeed, the words of the 1337 Charter do not speak of funding public functions and official duties, but rather of a desire to make specific provision in perpetuity for the maintenance of the heir to the throne "that he may be able to preserve the State and Honour of the said Duke according to the nobility of his kind" and to correct a "deficiency of Titles Honours and Degrees of rank".
103. In short, while we accept that there is a relationship between the revenues of the Duchy and tax payer-funded monies, that is of an entirely different nature from the situation of MP's expenses, for example, where the information concerned expenses which were entirely taxpayer funded claimed by those holding elected office. Also, what made the public interest compelling in those cases was the concern raised about impropriety in connection with the funds. That is no such concern in the present case. Although the Appellant considers the Law Officer's Opinion of 1913 to be flawed, to the extent he is saying that the correct position is that the Prince should be liable to income tax on the revenues of the Duchy, that is an argument that is independent of the disputed information and disclosure of the information would not materially advance his position.
104. The Appellant has also argued that the Commissioner's decision and the Respondents' case leaves out entirely what he regards is a weighty public interest in transparency and accountability of HMRC carrying out its duty to perform its statutory function of collecting monies. He argues that HMRC has granted the Duchy an extraordinary exemption from tax and has usurped what should be the proper function of Parliament. As we have already noted, however, the disputed information simply applies the principle that the Duchy's revenues are not subject to income tax and therefore, there is no tax for them to collect. In any event, if the Appellant's position is that



that principle based on the Law Officers' Opinions is wrong, his argument does not depend on the disputed information. There is also the point advanced by the Respondents, which we accept, that there is a public interest in fostering candour and trust in the exchange of information individuals may have with the tax authorities which would be compromised should such information be subject to disclosure.

105. For all these reasons, we consider that, in relation to the disputed information in groups (1) and (3), disclosure would not be fair and that the conditions in paragraph 6(1) of Schedule 2 are not met. We find, therefore, that the information is exempt under section 40(2) of FOIA.
106. We consider that TNA and the Commissioner should have explicitly considered the different items comprising the disputed information separately. The information coming within group (2) is of a different nature dealing only with what we have described as a process issue. It contains no information about the tax affairs of the data subject. However, it does contain an express expectation of confidentiality. We consider that disclosure of this information would be unlawful in that it would give rise to an actionable breach of confidence on the basis of the principles we have set out below in relation to section 41(1). We also consider that there is no material public interest in disclosure of this information. We find therefore, that this information is also exempt under section 40(2).

#### Section 41

107. On the basis of our findings above in relation to section 40(2), it may be that we do not need to go further and consider the position under section 41(1). We will do so, however, for completeness, although relatively briefly.
108. Section 41(1) of FOIA provides as follows:

*“Information is exempt information if –*  
*(a) it was obtained by the public authority from any other person (including another public authority), and*  
*(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”*
109. The exemption is absolute. It follows that if engaged, it is not necessary to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure. However, a public interest defence may be available in some cases against an action for breach of confidence and therefore public interest considerations may still be relevant.
110. It is not in dispute that an “actionable” breach of confidence is one in respect of which a claim would, on the balance of probabilities, succeed (rather than being simply arguable). There have been numerous judicial pronouncements about the elements necessary to found an action for breach of confidence. The most often cited is that of Megarry J in **Coco v**

**AN Clark (Engineers) Limited** where he set out three elements to such a claim:

*“First, the information itself ... must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it. ”*

111. We find that the requirement of section 41(1)(a) is met because the information was obtained by the public authority (TNA) from another public authority (HMRC). We find, for the reasons set out below, that the requirement of section 41(1)(b) is also met. We are satisfied that disclosure would constitute a breach of confidence. It has not been argued that it would be actionable by HMRC, but rather that it would be actionable by the Prince and/or the Queen. Section 41(1)(b) refers of course to the breach of confidence being actionable not just by the party from whom it was obtained, but also by “any other person”.

112. As to why we find that disclosure would amount to an actionable breach of confidence, we note that the information coming within groups (1) and (3) relate to specific tax issues. We accept that there is a general convention to protect the confidentiality of individual taxpayers and that this does not depend on the extent or degree of any invasion of privacy that would flow from treating them as public. We note and accept the evidence of Sue Walton that the long-standing and consistent practice of HMRC (and previously Inland Revenue) is that discussions with individuals or with companies or other legal entities in relation to their specific tax affairs are treated as private and in confidence.

113. TNA have also referred us to the following passage from *Simon’s Taxes*:

*“A general duty of confidentiality is owed by officers of HMRC, and it has long been the case that information provided to them is strictly confidential and should not be disclosed.”*

114. The House of Lords has reiterated these obligations of confidence in **R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed & Small Businesses Limited** in which Lord Wilberforce stated that “such assessments [of taxes] and all information regarding taxpayers’ affairs are strictly confidential” and that “[no] other person is given any right to make proposals about the tax payable by any individual: he cannot even inquire as to such tax. The total confidentiality of assessments and of negotiations between individuals and the revenue is a vital element in the working of the system.” In the same judgment Lord Scarman referred to the “very significant duty of confidence” owed by the Inland Revenue “in investigating, and dealing with, the affairs of the individual taxpayer”.

115. The Respondents say that the principle of confidentiality of tax records has also been enshrined in legislation and that in the period when the disputed information was created, the confidentiality of tax information was protected under section 2 of the Official Secrets Act 1911 under which it was a criminal

offence to disclose any information entrusted in confidence to a person holding office under Her Majesty to another person without authorisation. Section 2 applied to all information held in confidence by Inland Revenue offices, both personal and non-personal information. Subsequently, under the Taxes Management Act 1970, tax inspectors, commissioners and special commissioners were required to take an oath of confidentiality upon taking office. Section 2 of the Official Secrets Act 1911 was repealed by the Official Secrets Act 1989. Additional protections were enacted in relation to confidentiality, by way of section 182 of the Finance Act 1989. This makes it a criminal offence to disclose tax information relating to an identifiable person, unless the disclosure is made with lawful authority. The Inland Revenue merged with HMRC in 2005. Officials of HMRC are now subject to a statutory duty of confidentiality under section 18 of the Commissioners for Revenue and Customs Act 2005 ("CRCA") which provides:

*"Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs." By section 19(1) a person commits a criminal offence "if he contravenes section 18(1) ... by disclosing revenue and customs information relating to a person whose identity: (a) is specified in the disclosure, or (b) can be deduced from it.*

116. The Appellant disputes that the information in issue would have been covered by the Official Secrets Act, but that is not itself a point of great significance. What is clear is that if the disputed information was still held by HMRC, disclosure would be prohibited. Under section 19 of the CRCA, disclosure would have been a criminal offence and the information would have been exempt from disclosure under FOIA (section 44).
117. While these prohibitions on disclosure do not by themselves mean that the information "has the necessary quality of confidence about it", we consider that they reflect the intrinsically confidential nature of an individual's tax information. The disputed information consists, for the most part, of communications with the Inland Revenue on behalf of a potential taxpayer (in this case the Prince of Wales or the Sovereign), and exchanges internal to the Inland Revenue directly address the communications received. In our view, it would be a rare case when such information would not have the quality of confidence. We are entirely satisfied that the first limb of **Coco v Clark** is met.
118. In relation to the information coming within group 2, although these do not relate to any specific tax matters, they contain an express expectation as to confidentiality. We consider that in any event, it would be artificial to divorce them from the series of correspondence of which they form a part and which does have the necessary quality of confidence.
119. We consider that the second limb is met in relation to all the information in issue. We find that it was "imparted in circumstances importing an obligation of confidence". We note that the Inland Revenue sought extended closure in 1995 when the file was transferred to the Public Records Office (now TNA). We consider this to be a clear indication that the confidentiality attaching to

the information in the hands of HMRC was intended to continue notwithstanding the transfer to TNA.

120. In relation to those items of information originating with the Duchy' advisers (as opposed to being internally generated at the Inland Revenue), there is, in addition, clear evidence as to the expectations of the senders in relation to the confidentiality of the communication. There can be no doubt from the express terms of the communication, that it was being sent on the expectation that it would be kept confidential.
121. As to whether disclosure would amount to an "unauthorised use of that information to the detriment of the party communicating it" (the third limb of **Coco**), we acknowledge the debate in some cases as to whether this is an independent requirement, particularly where the private information of an individual is involved rather than commercial information. We are satisfied that where the information is private information, it is not necessary to show specific detriment. Loss of confidence and privacy suffice: see for example **McKennitt v Ash**, **Douglas v Hello**, and **British Union for the Abolition of Vivisection v The Home Office and the Information Commissioner**. We consider this to be the case even where the information is not specific as to amounts of income or tax payable. There would be a breach of a legitimate expectation that questions could be asked to HMRC and legal arguments presented in confidence.
122. TNA say, and we accept that **Coco v Clark** is "only part of the story, so far as section 41 is concerned" and that disclosure would also be a misuse of private information, the modern form of action for breach of confidence underpinned by the duty on public authorities by section 6(1) of the Human Rights Act 1998 not to act in a way which is incompatible with Article 8 of the ECHR. However, based on our findings above, we do not consider that we need to go any further than we have.
123. As already noted, although the exemption in section 41(1) is absolute, an action for breach of confidence can be met with a public interest defence and therefore public interest considerations are still relevant. In the terms articulated by Lord Phillips in **HRH Prince of Wales v Associated Newspapers** at paragraph 68:
- "The court will need to consider whether, having regard to the nature of the information, and all of the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public."*
124. We have already addressed the relevant factors public interest factors above, in relation to section 40(2). For the reasons set out there, while we acknowledge the public interest considerations involved in relation to the Prince and the tax treatment of the revenues from the Duchy, we do not consider them to be material having regard to the content of the disputed information.

125. For all these reasons we find that the disputed information is exempt under both section 40(2) and section 41(1) of FOIA.

**Decision**

126. We dismiss the appeal. Our decision is unanimous

Signed:

Anisa Dhanji  
Tribunal Judge

Date: 6 January 2013

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*Case of Mines* (1567) (1 Plowd 310 at 315-316)

*Chasyn v Lord Stourton* (1553) (1 Dyer 94a) (73 E.R. 205)

*Department of Business Innovation & Skill v The Information Commissioner* (2012) (EA/2012/0057)

*Devon Peerage Case* (1831) (5 Bli NS 220) (2 Dow & Cl 200) (2 State Tr NS 659)

*Duchy of Cornwall Case* (1613) (1 Ves Sen 292)

*Duchy of Lancaster Case* (1561) (1 Plowd 212)

*Dyke v Walford* (1846) 5 Moo PCCC 434

*Ex parte Postmaster General* (1879) (L.R. 10 C.D. 595)

*Evans v Information Commissioner and Others* (2012) UKUT 313 (AAC))

*Frederick Richard Albert Trull v Restormel Borough Council* (1994) (1994 WL 1062112)

*The Guelder Rose* (1927) (136 LT 226)

*Hensloe's Case* (1599) (9 Coke Reports 36b)

*Jewison v Dyson* (1842) (9 Meeson and Welsby 540) (152 E.R. 228)

*The Kings Case* (1604) (7 Co Rep 32a)

*Kirkhope v Information Commission and The National Archive* (2012) (EA/2011/0185)

*Langworth v Scott* (1616) (3 Bulstr 183)

*Lomax v Holmden* (1749) (1 Vesey Senior 290) (27 E.R. 1038)

*Lopez v Andrew* (1826) (3 Man & Ry K.B. 329n)

*Manchester Corporation v Manchester Palace of Varieties Ltd* (1955) (2 WLR 440) (1 All ER 387)

*Mercer v Denne* (1902) (M 417 (1905) 2 Ch 538)

*Mersey Docks v Cameron* (1865) (11 H.L.C. 443)

*Michael Bruton v ICO and The Duchy of Cornwall* (2011) (EA/2010/0182)

*Pearce v Grundy* (1818) (Decided by Vice Warden of the Stannaries 7<sup>th</sup> April 1818)

*Penryn Corporation v Holm* (1877) (2 Ex D 328) (46 LJQB 506) (25 WR 498) (37 LT 133)

*Prince Henry's Charter Case* (1611) (1 Bulst 133)

*The Princes Case* (1606) (8 Rep 1a) (77 E.R. 481)

*R v Cook* (1790) (3 T.R. 519)

*R v East Powder Magistrates' Court Ex Parte Lampshire* (1979) (2 All ER 329)

*R v Inhabitants of Hermitage* (1692) (Carth. 239) (90 ER 743)

*Re: Oriental Bank* (1884) (L.R. 28 C.D. 643)

*Re: Salisbury Railway and Market House Co (1967)* (3 WLR 651)

Resolution of the Judges 1608

Resolution of the Privy Council 1632

*Regina v Ernest Nute and Others (2001)* (Case No T20010073)

*Rex v Mayor and Jurats of Hastings (1882)* (1 Dowl & Ry. 148)

*Rex v Steward of Havering (1822)* (2 Dowl. & Ry 176n)

*Rex v Wells Corporation (1836)* (4 Dowl. 562)

*Rowe v Brenton (1828)* (8 B & C 737) (3 Man & Ry KB 133) (108 E.R. 1217)  
(Concanen's Rep 1)

*Re Salisbury Railway and Market House Co. (1967)* (3 WLR 651)

*Sheriff (1704)* (3 Salkeld 322 91 E.R. 849)

*Sir Henry Constables Case (1601)* (5 Co Rep 106a)

*Smartsources Drainage & Water Reports Ltd v ICO (2011)* (1 Info LR 1498)

*Strode's Case (1512)* (1 Hats. 85) (Howell's State Trials 294)

*The Solicitor to the Duchy of Cornwall v Canning (1880)* (5 P.D. 114 Probate)

*Sturla v Feccia (1880)* (5 App. Cas 623, 643)

*Three Rivers District Council and others v Governor and Company of the Bank of England (2004)* (UKHL 48)

*Tregilgas v Dingey (1843)*

*Re: Treverbyn Trevanion Clay Works (1872)* (Reported in Royal Institute of Cornwall Gazette 1<sup>st</sup> June 1972)

*Trewynard v Killigrew (1562)* (4 and 7 Elizabeth 1)

*Trewynnard v Roscarrack (1564)* (4 Coke's Institutes 229)

*Weymouth v Nugent (1865)* (6 B & S 22)



*Wilkes Peerage Claim (1869)* (LR 4 HL 126)

*Willion v Berkley (1561)* (1 Plowden 223) (75 E.R. 339 (KB))

### *Information Commissioners Decisions*

FS50235796	April 2010	Duchy of Lancaster a public authority
FS50259426	October 2010	Duchy of Cornwall a public authority
FS50348825	July 2011	The National Archives releasing files from 1960/62
FER0380352	February 2012	Department of Environment, Food and Rural Affairs
FS50381429	February 2012	Department for Transport
FS50387051	February 2012	Department of Business Innovation and Skills
FS50423025	August 2012	Cabinet Office
FS50444734	September 2012	HM Revenue and Customs